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IN THE
SUPREME COURT OF THE UNITED STATES

THE CITY OF NEW YORK, and RUDOLPH GIULIANI, as Mayor of the City of New York,

Petitioners,

- against -

THE UNITED STATES OF AMERICA, and JANET RENO, as Attorney General of the United States,

Respondents.

On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Second Circuit

PETITION FOR A WRIT OF CERTIORARI

MICHAEL D. HESS
Corporation Counsel for the
City of New York
Attorney for Petitioners
100 Church Street
New York, N.Y. 10007
(212) 788-0835 or 1010

LEONARD J. KOERNER,*
EDWARD F. X. HART,
of Counsel.

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QUESTION PRESENTED

Do section 434 of the Welfare Reform Act and section 642 of the Immigration Reform Act violate the Tenth Amendment and principles of federalism by prohibiting State or local governments from restricting, pursuant to statutes enacted in furtherance of their police powers, their agencies and employees from divulging government information regarding immigration status of individuals to the Immigration and Naturalization Service?

PARTIES TO THE PROCEEDING

The parties to this case when it commenced were as follows:

1. The City of New York, plaintiff.

2. Rudolph Giuliani, in his official capacity as Mayor of the City of New York, plaintiff.

3. The United States of America, defendant.

4. Janet Reno, in her official capacity as Attorney General of the United States of America, defendant.

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No.

IN THE
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THE CITY OF NEW YORK, and RUDOLPH GIULIANI, as Mayor of the City of New York,

Petitioners,

- against -

THE UNITED STATES OF AMERICA, and JANET RENO, as Attorney General of the United States,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The petitioners, the City of New York and Rudolph Giuliani, as Mayor of the City of New York, respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit entered in the above-titled matter on May 27, 1999.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Second Circuit, dated May 27, 1999, is reprinted in the Appendix at page 1. Its citation is 179 F.3d 29 (2d Cir. 1999). The opinion of the United States District Court for the Southern District of New York, dated July 18, 1997, is reprinted in the Appendix at page 53. Its citation is 971 F. Supp. 789 (S.D.N.Y. 1997).

JURISDICTION

The judgment of the United States Court of Appeals for the Second Circuit sought to be reviewed was dated and entered on May 27, 1999. The jurisdiction of this Court is invoked under the provision 28 U.S.C. § 1254(1). This petition has been filed within the time allowed by law.

CONSTITUTIONAL AND STATUTORY PROVISIONS

The United States Constitution

Tenth Amendment

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or the people.

Executive Order No. 124 which, in relevant part, provides:

> **Section 2. Confidentiality of Information Respecting Aliens.**
>
> a. No City officer or employee shall transmit information respecting any alien to federal immigration authorities unless
>
> (1) such officer's or employee's agency is required by law to d :close information respecting such alien, or
>
> (2) such agency has been authorized, in writing signed by such alien, to verify such alien's immigration status, or
>
> (3) such alien is suspected by such agency of engaging in criminal activity, including an attempt to obtain public assistance benefits through the use of fraudulent documents.
>
> b. Each agency shall designate one or more officers or employees who shall be responsible for receiving reports from such agency's line workers on aliens suspected of criminal activity and for determining, on a case by case basis, what action, if any, to take on such reports. No such determination shall be made by any line worker, nor shall any line worker transmit information respecting any alien directly to federal immigration authorities.

c. Enforcement agencies, including the Police Department and the Department of Correction, shall continue to cooperate with federal authorities in investigating and apprehending aliens suspected of criminal activity. However, such agencies shall not transmit to federal authorities information respecting any alien who is the victim of a crime.

Section 3. Availability of City Services to Aliens.

Any service provided by a City agency shall be made available to all aliens who are otherwise eligible for such service unless such agency is required by law to deny eligibility for such services to aliens. Every City agency shall encourage aliens to make use of those services provided by such agency for which aliens are not denied eligibility by law.

Section 434 of the Welfare Reform Act is reproduced at Appendix, pages 97-98.

Section 642 of the Immigration Reform Act is reproduced at Appendix, pages 98-99, and at pages 6-7 of this petition.

STATEMENT OF THE CASE

In response to an extensive City-wide study, published in August, 1989, by the City of New York Commission on Human Rights, which disclosed widespread discrimination against immigrants, both legal and undocumented, in employment, housing and public accommodations and found that many immigrants were reluctant to speak out about their problems because they feared deportation for having cooperated with a government agency, Mayor Edward Koch issued Executive Order No. 124 that same month, which articulated the "City Policy Concerning Aliens" (95).[1] Both of Mayor Koch's successors, David N. Dinkins and the City's current Mayor, Rudolph W. Giuliani, reissued Executive Order No. 124, which prohibits City employees from transmitting information gathered by City employees and agencies respecting any alien to federal immigration authorities except under certain circumscribed conditions (95).

On August 22, 1996, the Welfare Reform Act was signed into law. Section 434 of the Act, entitled "Communication between State and Local Government Agencies and the Immigration and Naturalization Service," provides that no State or local government entity may be prohibited or restricted from communicating with the INS regarding the immigration status of aliens (97-98). As explained in the Conference Report to the bill, the provision "is designed to prevent any State or local law, ordinance, executive order, policy, constitutional provision, or decision of any Federal or State court that prohibits or in any way restricts any communication between State and local

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[1] References in parentheses refer to pages of the Appendix.

officials and the INS." H.R. Conf. Rep. No. 725, 104th Cong., 2d Sess, 383 (1996), reprinted in 1996 U.S.C.C.A.N. 2649, 2771.

On September 30, 1996, the Immigration Reform Act was signed into law. Section 642 of the Act, entitled "Communications Between Government Agencies and the Immigration and Naturalization Service," provides in relevant part:

> (a) IN GENERAL. -- Notwithstanding any other provision of Federal, State, or local law, a Federal, State, or local government entity or official may not prohibit, or in any way restrict, any government entity or official from sending to, or receiving from, the Immigration and Naturalization Service information regarding the citizenship or immigration status, lawful or unlawful, of any individual.
>
> (b) ADDITIONAL AUTHORITY OF GOVERNMENT ENTITIES. --
>
> Notwithstanding any other provision of Federal, State, or local law, no person or agency may prohibit, or in any way restrict, a Federal, State, or local government entity from doing any of the following with respect to information regarding the immigration status, lawful or unlawful, of any individual:
>
> (1) Sending such information to, or requesting or receiving such information

from, the Immigration and Naturalization Service.

(2) Maintaining such information.

(3) Exchanging such information with any other Federal, State, or local government entity.

(c) OBLIGATION TO RESPOND TO INQUIRIES. -- The Immigration and Naturalization Service shall respond to an inquiry by a Federal, State, or local government agency, seeking to verify or ascertain the citizenship or immigration status of any individual within the jurisdiction of the agency for any purpose authorized by law, by providing the requested verification or status information.

On October 11, 1996, the City of New York commenced an action for declaratory and injunctive relief challenging the constitutionality of section 434 of the Welfare Reform Act and section 642 of the Immigration Reform Act and setting forth three causes of action (20-43).

First, by prohibiting the City from issuing executive orders, enacting legislation, or otherwise making policy regarding the reporting of undocumented aliens by City officials, sections 434 and 642 have commandeered the City's legislative and executive policymaking apparatus, diminishing political accountability and violating the Tenth Amendment and principles of federalism (37-39). The Tenth Amendment provides that "[t]he powers not delegated

to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

Second, sections 434 and 642, which are directed only at States and localities and not at private individuals, interfere with core functions of City government, including its ability to exercise police powers to provide for public health and safety and to control its own workforce, in violation of the Tenth Amendment and principles of federalism (40-41).

Third, sections 434 and 642 interfere with the ability of states and local governments and their duly-elected officials to represent the electorate by engaging in the sovereign process of passing legislation or otherwise enacting a policy that prohibits or restricts their officials from sending information to the INS, in violation of the Guarantee Clause (41-42). The Guarantee Clause provides that "[t]he United States shall guarantee to every State in this Union a Republican Form of Government . . ." U.S. Const., Art. IV, § 4.

The policy embodied in Executive Order No. 124 is evident: "undocumented aliens who are witnesses to or victims of crime must not be deterred from coming forward for fear of deportation, nor should undocumented aliens who are infected with contagious diseases be deterred from seeking treatment, nor should undocumented alien children be afraid to attend public schools and forfeit their right to an education. The safety and public health of the entire City are dependent on all residents, regardless of their immigration status, cooperating with the government and securing government services to which they are entitled."

Executive Order No. 124 also ensures that "City officials, who do not have the expertise or authority to determine immigration status, are not put in the position of being permitted to determine that status and to report those ad hoc, inaccurate and inconsistent determinations to the INS [the Immigration and Naturalization Service]."

The City stated that, as of October 1992, the Immigration and Naturalization Service estimated that there were 449,000 undocumented aliens residing in New York State and that this population was growing at the rate of 41,000 annually (24-25).[2] Thus, as of October 1993, there were an estimated 490,000 undocumented aliens living in this State, approximately 80% (i.e., 400,000) of whom resided in New York City. A study published by the Urban Institute in 1994 estimated that, as of October 1993, 21.6% of the total number of undocumented aliens residing in New York State were of school age (i.e., approximately 85,000 children) (25).

More than 4,000 undocumented aliens who pass through City jails every year are reported to INS, but only approximately two to three hundred of these immigrants are deported annually (26). The Immigration and Naturalization Service has deported almost no undocumented aliens residing in this City who are not convicted criminals. Law-abiding undocumented aliens are among the City's long-term residents and are part of the fabric of this City (26).

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[2] These estimates were published in the 1993 Statistical Yearbook of the Immigration and Naturalization Service (9).

The concentration of undocumented aliens is particularly high in neighborhoods where new, legal immigrants have settled (27). This is because many families are comprised of legal aliens, undocumented aliens, and United States citizens. The intermingling of undocumented aliens with other residents throughout the City, including in public schools, day care centers, playgrounds, and public transportation, has profound consequences for the public health and safety of the entire City (27).

Many childhood diseases are highly contagious and, if left untreated, will infect other children (29). Moreover, undocumented aliens often make up essential links in the investigative chain necessary for the New York City Department of Health to trace outbreaks of contagious diseases, such as tuberculosis, sexually transmitted diseases, and other public health problems (29). If undocumented aliens are reluctant to cooperate with public health officers for fear of being reported to the INS, the health of all City residents is jeopardized.

Children deprived of an education will be more likely to turn to crime. Immigrant children, many of whom will eventually legalize their status, will have great difficulty finding employment in the future. These residents, consequently, will be precluded from contributing to the City's economy, and may become dependent on public assistance (29).

As a result of their undocumented status, immigrants are particularly vulnerable to victimization (28). If the City cannot guarantee undocumented aliens, who are victims or witnesses or crimes, that their immigration status will not

be disclosed to the INS, the ability of law enforcement officers to fight crime will be undermined to the detriment of all residents.

On January 10, 1997, the United States served its answer and asserted, inter alia, that the City's action was barred by the Supremacy Clause of the Constitution, Art. VI, cl. 2, 3 (45-51).

On February 7, 1997, both parties simultaneously moved for judgment on the pleadings pursuant to Rule 12(c) of the Federal Rules of Civil Procedure.

DECISIONS BELOW

(1)

In granting the federal government's motion for judgment on the pleadings and dismissing the City's three causes of action, the District Court acknowledged that "the Tenth Amendment and the principles of Federalism inherent in the structure of the Constitution limit the ways in which Congress can require action by the states in pursuit of federal policies" (67). However, Congress may encourage a state to regulate in a particular way or to provide incentives to the states as a method of influencing a state's policy choices, or may pass appropriate legislation in areas of federal concern that preempts contrary state laws" (69).

The Court concluded that sections 434 and 642 "do not require the City to legislate, regulate, enforce, or otherwise implement federal immigration policy. Instead, they direct only that City officials and agencies be allowed, if they so choose, to share information with federal

authorities. The statutes do not even require any City official to provide any information to federal authorities. They only prevent the City from interfering with a voluntary exchange of information. Although the statutes can be characterized as interfering with a City policy that prevents its officials from cooperating with federal immigration authorities except in accordance with certain procedures, that effect on local policy is not the type of intrusion that is sufficient to violate the Tenth Amendment or principles of federalism" (72-73). The Court stated that the challenged provisions "are even less intrusive on state sovereignty than those mandatory reporting statutes whose validity the Supreme Court explicitly refrained from deciding" (75) in Printz v. United States, __ U.S. __, 117 S.Ct. 2365, 138 L.Ed.2d 914 (1997).

The Court further concluded that "although political accountability is a basis for concluding that Congress lacks the power to compel the states to regulate or to conscript state and local officials in carrying out a federal program, political accountability standing alone is not a basis for invalidating a Congressional statute that does not implement a federal program in an impermissible way" (77).

In also dismissing the second cause of action, the Court rejected the City's contention that a substantive analysis under the Tenth Amendment survives, Garcia v. San Antonio Metropolitan Transit Authority, 469 U.S. 528 (1985), when legislation is directed solely at states or local governments.

The Court of Appeals, noting the substantial burden that the City bears in a facial challenge to a legislative Act, treated two aspects of the City's Tenth Amendment argument seriatim, i.e., that the scope of state sovereignty includes the power to choose not to participate in federal regulatory programs, which includes the power to forbid state or local agencies, officials and employees from voluntarily aiding such programs, and that the federal government may not use its power to legislate in an area to disrupt the actual operation of state or local government (10).

Noting the City's scope-of-state-sovereignty argument relies principally upon Printz v. United States, __ U.S. __, 117 S.Ct. 2365 (1997), and New York v. United States, 505 U.S. 144 (1992), the Court chose "not to read these cases so broadly" (11). "The central teaching of these cases is that 'even where Congress has the authority under the Constitution to pass laws requiring or prohibiting certain acts, it lacks the power directly to compel the States to require or prohibit those acts' [citing New York v. United States, 505 U.S. at 166]" (11). Distinguishing Printz and New York from the instant case, the Court found no federal compulsion nor the affirmative conscription of states, localities or their employees into federal government service.

The Court viewed the City's argument as a request "to turn the Tenth Amendment's shield against the federal government's using state and local governments to enact and administer federal programs into a sword allowing states and localities to engage in passive resistance that

frustrates federal programs" (12-13). Relying upon the Supremacy Clause, "which bars states from taking actions that frustrate federal laws and regulatory schemes," the Court held that the states do not retain an untrammeled right to forbid all voluntary cooperation by state and local officials with particular federal programs (13). In view of the City's facial challenge to the statutes and the Executive Order's mandatory non-cooperation directive relating to a particular federal program, the Court found no need to locate the line between invalid federal measures and valid measures that prohibit states from compelling passive resistance (13-14).

Next, the Court dealt with the City's argument that the statutes violate the Tenth Amendment because they interfere with local government operations by regulating both the use of confidential information acquired by the local government in the course of its official business and by regulating the scope and nature of local government employees regarding such information (14). The City's concerns in this regard are "not insubstantial" (15) The Court recognized that obtaining information essential to a wide variety of governmental functions may be difficult or impossible without an expectation of confidentiality; that preserving confidentiality in turn requires local government's regulation of the use of information by its employees; and that the challenged regulation of the use of information by its challenged statutes undeniably interfere with the City's control, both over the information and over its employees' use of such information (15-16).

The Court held, however, that the City's facial challenge, resting, as it does, solely upon the Executive Order, is insufficient to demonstrate an impermissible

intrusion of local control of information obtained in the course of official business (16).

The Court stated that, at oral argument, it invited the City to inform the Court whether the information covered by the Executive Order might be subject to other confidentiality provisions that would prevent dissemination generally. Since, in the Court's view, the extensive material and commentary provided by the City was insufficient to enable the Court to determine whether the challenged statutes were more intrusive than when viewed from the perspective of the Executive Order alone, it limited its inquiry solely to the facial effect of the statutes on the Executive Order. In that circumscribed context, the Court upheld the constitutionality of Sections 434 and 642, relying upon its analysis relating to the power of the states to command passive resistance to federal programs (17).

The Court, for the same reasons stated above, rejected the City's argument that the offending sections violate the Constitution's Guarantee Clause, U.S. Constitution, Art. IV, § 4 (18).

REASONS FOR GRANTING THE WRIT

THIS CASE PRESENTS AN IMPORTANT QUESTION OF LAW CONCERNING THE TENTH AMENDMENT GUARANTEE OF SOVEREIGNTY TO LOCAL GOVERNMENT AND THE FEDERAL GOVERNMENT'S INFRINGEMENT UPON THAT SOVEREIGNTY BY ITS UNCONSTITUTIONAL INTERFERENCE WITH THE LOCAL GOVERNMENT'S LEGISLATIVE PROCESS AND THE EXERCISE OF ITS POLICE POWERS.

In New York v. United States, 505 U.S. 144 (1992), this Court held that Congress cannot compel the States to enact or enforce a federal regulatory program without violating the Tenth Amendment. In Printz v. United States, __ U.S. __, 117 S.Ct. 2365 (1997), the Court held that Congress cannot circumvent that prohibition by conscripting the State's officers directly. "[S]uch commands are fundamentally incompatible with our constitutional system of dual sovereignty." Printz, 117 S.Ct., at 2384. We submit that, in the instant case, the United States violated the Tenth Amendment by interfering with the City's control of its employees and the information those employees gather; by disrupting the City's legitimate exercise of its police power; and by interfering with the integrity of the City's legislative process.

The Welfare Reform Act of 1996 and the Immigration Reform Act of 1996, to the extent that they

directly regulate immigration, an area reserved by the Constitution to the federal government, preempt the field from regulation by the states or local governments. Section 434 of the Welfare Reform Act and section 642 of the Immigration Reform Act, however, violate the Tenth Amendment and principles of federalism by unconstitutionally interfering with the local government's legislative process and the exercise of its police powers. The exercise of police powers to protect the health, safety, good order and general welfare of the people is the chief purpose of local government, and has never been surrendered to the federal government. See Kovacs v. Cooper, 336 U.S. 77, 83 (1949). Police powers are inherent in the States and their political subdivisions, reserved to them by the Constitution, and necessary to their existence as separate and independent governments. How much the preservation of health, prevention of crime and protection of the general welfare demand the restriction or prohibition of certain activities is a matter to be determined by the representatives of local government upon their own views of public policy, taking into consideration local knowledge and experience in dealing with the needs of a heterogeneous population such as in the City of New York.

The City of New York exercised its sovereign power to make the policy choices embodied in Executive Order No. 124 through its political process. It was promulgated not from any attempt to regulate immigration or to interfere with matters entrusted to Congress by the Constitution. Rather, this Executive Order was issued to protect the health, safety and well-being of all New York City residents by assuring the confidentiality of law-abiding immigrants, many of whom were not seeking medical attention, reporting crimes, or sending their children to school for

"fear that any contact with a government agency will bring them to the attention of federal immigration authorities." See Statement of Basis and Purpose of Executive Order (107).

In New York City, undocumented aliens mix with other residents in all walks of life, including public schools, day care centers, playgrounds, and public transportation. The health, safety and future of this City are dependent on all residents, regardless of their immigration status, seeking medical treatment for contagious diseases, reporting crimes and sending their children to school. As a matter of public policy for the commonweal, undocumented aliens should not be discouraged from attending to these important matters for fear that City employees, while functioning in their official capacity as health care officials, police officers, and school teachers, will report them to the Immigration and Naturalization Service.

The Court of Appeals recognized the City's dilemma and found its concerns to be substantial. It stated (15-16):

> The obtaining of pertinent information, which is essential to a wide variety of state and local government functions, may in some cases be difficult or impossible if some expectation of confidentiality is not preserved. Preserving confidentiality may in turn require that state and local governments regulate the use of such information by their employees. Finally, it is undeniable that Sections 434 and 642 do interfere with the City's control over confidential information obtained in the course of municipal business

and over its employees' use of such information.

The City provides confidentiality protection to much of the information it gathers pursuant to the exercise of its police powers. See, e.g., N.Y. Social Services Law, § 136 (Confidentiality of records concerning Protection of Public Welfare records); N.Y. Social Services Law, § 372 (Confidentiality of records concerning Care and Protection of Children); 4 New York Code of Rules and Regulations, § 83.5 (Confidentiality of medical records); N.Y. Public Officers Law, § 87 (Access to agency records); 12 Rules of the City of New York § 1-102 (Confidentiality of information obtained by Commission on Human Rights). Since the City has no authority or regulatory power in the area of immigration, it does not have a statute or regulation specifically guaranteeing the confidentiality of information concerning immigration status, except for Executive Order 124. The reach of the order is, however, very broad in that it extends to all of the many areas in which the City's police power operates and where information concerning an individual's immigration status may tangentially arise or where an individual may be reluctant to impart vital information for fear that his or her status might be detected and revealed to the federal authorities. The confidentiality does not, moreover, operate only against the federal immigration authority, although it is obviously the only source of concern to an individual with a questionable immigration status. The sole rational interpretation of the Executive Order in view of the stated purpose for its promulgation is that it protects information concerning immigration status from revelation to anyone, unless one of the exceptions is applicable. See Statement of Basis and Purpose of Executive Order (107).

We submit that such an intrusion by Congress destabilizes the balance sought to be achieved in our federal system by the Tenth Amendment and we, therefore, petition this Court to right that delicate balance. The Court has already granted a writ of certiorari to the Court of Appeals for the Fourth Circuit in Condon v. Reno, 155 F.3d 453 (4th Cir. 1998), cert. granted, __ U.S. __, 119 S. Ct. 1753 (1999), where the Court of Appeals held that the Driver's Privacy Protection Act violated the Tenth Amendment. The DPPA exclusively regulates the disclosure of information contained in state motor vehicle records and effectively prevents the States from disclosing such information if it chooses. The instant case presents the mirror image of the constitutional violation in Condon v. Reno, because here the United States enjoins the City of New York from preventing its employees from disseminating information belonging to the City. There is, moreover, a conflict between the holding of Condon and that of the instant case. Granting a writ of certiorari to the Second Circuit here would present the Court with the opportunity to review these Tenth Amendment issues in a more comprehensive manner.

A. Congress has no power under the Constitution to enact sections 434 and 642.

Sections 434 and 642 were "designed to prevent any State or local law, ordinance, executive order, policy, constitutional provision, or decision of any Federal or State court that prohibits or in any way restricts any communication between State and local officials and the INS." H.R. Conf. Rep. No. 725, 104th Cong., 2d Sess. 383 (1996), reprinted in 1996 U.S.C.C.A.N. 2649, 2771. The People of the States did not, however, confer authority

upon Congress to subordinate their health, safety and well-being to the regulation of immigrants in accordance with congressionally-imposed rules. No matter how strong the federal interest may be, the Constitution simply does not give Congress the authority to conduct its business in a fashion that inflicts injury upon the public, or to obstruct the operations of municipal government directed at protecting the public. The power of Congress to regulate immigration was not intended as an authority to control local governments in the exercise of their police powers over local matters, always existing and carefully reserved to them in the Tenth Amendment.

Local government's power to protect its residents and Congress's power to regulate immigration are essential to both governments and must stand together. These twin powers, which are exclusive, distinct and independent, will act as mutual restraints only if both are credible. Gregory v. Ashcroft, 501 U.S. 452, 457 (1991); see Printz v. United States, __U.S.__, 117 S.Ct. 2365, 2377 (1997) ("local or municipal authorities form distinct and independent portions of the supremacy, no more subject, within their respective spheres, to the general authority than the general authority is subject to them, within its own sphere," quoting Madison, The Federalist No. 39, at 245); Texas v. White, 74 U.S. 700, 725 (1868) ("The preservation of the States, and the maintenance of their governments, are as much within the design and care of the Constitution as the preservation of the Union and the maintenance of the National government. The Constitution, in all its provisions, looks to an indestructible Union, composed of indestructible States").

Congress has no general police power; it may exercise a police power only incident to some authority expressly delegated to it by the Constitution. See United States v. Lopez, 514 U.S. 549, 584-85 (1995) (Thomas, J., concurring)("the Federal Government has nothing approaching a police power"). It is only when Congress acts within its enumerated powers, and a federal regulation and countervailing State or local interests cannot be reconciled or consistently stand together, that the local interests must yield to the federal government under the Supremacy Clause. See Maryland v. Wirtz, 392 U.S. 183, 196 (1968). That is not, however, the case here.

The Court of Appeals invoked the Supremacy Clause as the source of federal authority to enact sections 434 and 642. Art. VI, cl. 2 (25). The Supremacy Clause, however, makes the "Law of the Land" only "Laws of the United States which shall be made in Pursuance [of the Constitution]." Printz v. United States, supra, 117 S.Ct., at 2379. In the instant case, the Supremacy Clause merely brings us to the question of whether these provisions "violate State sovereignty and are thus not in accord with the Constitution." Id.

The statutes at issue do not constitute a lawful assertion of congressional authority over the process of naturalization, or the regulation of commerce among the States, or foreign affairs, but an invasion by the federal government into a local sovereign matter, and over which no authority has been delegated to Congress under the Constitution. It does not follow that Congress's powers to perform these functions authorize its interference with State and local autonomy. The fear of this precise danger -- that Congress would devour the essence of State sovereignty --

is what mobilized the States to demand the Tenth Amendment.

In conferring upon Congress the power to regulate immigration, there was no intent on the part of the Framers of the Constitution to preclude State and local governments from enacting policy with respect to the health, welfare and safety of its residents, though the policy might indirectly affect the objectives of Congress to regulate immigrants, lawful or unlawful. In the instant case, Congress seeks to regulate immigration in a far-reaching and impermissible way.

In rejecting an analogous intrusion by Congress under the Commerce Clause, this Court held that the Gun-Free School Zones Act, which made it a federal offense for any individual knowingly to possess a firearm at a place that the individual knows or has reasonable cause to believe is within a school zone, violated the Tenth Amendment. United States v. Lopez, supra, 514 U.S. 549. The Court recognized that the Act exceeded Congress's Commerce Clause authority, since possession of a gun in a local school zone was not an economic activity that substantially affected interstate commerce. United States v. Lopez, supra, 514 U.S., at 556-57. The Court stated that "[t]o uphold the Government's contentions here, we would have to pile inference upon inference in a manner that would bid fair to convert congressional authority under the Commerce Clause to a general police power of the sort retained by the States." United States v. Lopez, supra, 514 U.S., at 567. The Court made clear that "the scope of the interstate commerce power 'must be considered in the light of our dual system of government and may not be extended so as to embrace effects upon interstate commerce so indirect and

remote that to embrace them, in view of our complex society, would effectually obliterate the distinction between what is national and what is local and create a completely centralized government.'" United States v. Lopez, supra, 514 U.S., at 557, quoting NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937).

In enacting sections 434 and 642, Congress has engaged in legislative legerdemain in an attempt to fashion its will to meet constitutional muster. Under the guise of regulating immigration, Congress seeks to displace the policy decisions of State and local governments in the exercise of their police powers, and to control the conduct and daily activities of their officials -- not as private citizens, but as employees of State and local governments -- to fulfill the purposes of Congress.

B. Sections 434 and 642 deprive the City of New York of the essence of its sovereign power to protect the health, safety and welfare of the people, interfere with its internal policies and affairs, and obstruct and burden its governmental operations, under the guise of regulating immigration.

Executive Order No. 124 directs City employees, while acting in their official capacity in City-created agencies, to maintain the confidentiality of law-abiding immigrants, whose open and honest communications are essential to the preservation of health, prevention of crime and the protection of the public welfare. This information belongs to the City and is available to City employees only in their official capacity. The Mayor has the power to establish a policy prohibiting City employees, who do not

have the expertise or authority to determine immigration status, to make ad hoc decisions regarding that status. There is also no question that the Mayor may forbid City employees from using City time, resources, and information gathered by the City to report law-abiding immigrants to INS.

The New York City Charter expressly provides that the Mayor, as the chief executive officer, "shall be responsible for the effectiveness and integrity of city government operations and shall establish and maintain such policies and procedures as are necessary and appropriate to accomplish this responsibility including the implementation of effective systems of internal control by each agency and unit under the jurisdiction of the mayor." N.Y.C. Charter §§ 3 & 8(a). The City Council is "vested with the legislative power of the city." N.Y.C. Charter § 21.

Sections 434 and 642 prohibit the Mayor and the City Council from exercising their executive and legislative powers and responsibilities in accordance with the policies and priorities of local government. The power to set policy and to regulate its own internal procedures is what gives local government its sovereign nature. This includes the ability to control City employees and to assign their duties. See Koog v. United States, 79 F.3d 452, 460 (5th Cir. 1996) ("Whatever the outer limits of state sovereignty may be, it surely encompasses the right to set the duties of office for state-created officials and to regulate the internal affairs of governmental bodies"), cert. denied sub. nom. United States v. Gonzalez, 117 S.Ct. 2507 (1997); Romero v. United States, 883 F.Supp. 1076, 1086 (W.D. La. 1995) (State has sovereign right to maintain order by "defining and assigning the duties of its sheriffs").

The City of New York does not seek immunity from a regulation that is otherwise within Congress's powers to regulate immigration. The challenged provisions do not constitute a lawful assertion of congressional authority over immigration or over interstate commerce pursuant to the Commerce Clause, but an invasion by the federal government over a local sovereign matter, and over which no authority has been delegated to Congress in conferring the power to regulate commerce among the States.

C. By acting to control State and local officials and agencies rather than regulating immigration itself, Congress has subjected State and local governments to federal direction.

This Court has made clear that States and their political subdivisions "are not subject to federal direction" (emphasis in original). Printz v. United States, supra, 117 S.Ct. at 2373; New York v. United States, 505 U.S. 144, 162 (1992) (the Constitution does not "confer upon Congress the ability to require the States to govern according to Congress' instructions").

The view that sections 434 and 642 do not violate the Tenth Amendment and principles of federalism because "[t]hese Sections do not directly compel states or localities to require or prohibit anything" does not withstand scrutiny. The whole object of sections 434 and 642 is to prevent state and local governments from exercising control over their own employees and their own property in the form of information. The language of these provisions makes evident that the federal government seeks a direct exchange of information between State and local employees and INS

regarding the "immigration status, lawful or unlawful, of any individual." This exchange of information is to occur without any interference from the "middle man," i.e., the State or municipal employer.

Congress is doing indirectly what it cannot do directly. The federal government's power would be augmented immeasurably and impermissibly if it were able to impress into its service -- and at no cost to itself -- any percentage of the millions of State and municipal employees of the 50 States. See Printz v. United States, supra, 117 S.Ct., at 2378. Given the current anti-immigrant sentiment in certain segments of the population, INS will, no doubt, have plenty of State and local assistance in performing its job. The constitutional problem, however, is that State and local employees cannot be enlisted as the agents, spies or foot soldiers of the federal government. When Congress desires to regulate in areas where it has authority under the Constitution, it must do so directly and cannot conscript State and local governments to do its bidding. See Printz v. United States, supra, 117 S.Ct., at 2384.

While Congress, short of outright coercion, may encourage a State to conform to federal policy choices, the residents of the State retain the ultimate decision as to whether or not the State will comply. New York v. United States, supra, 505 U.S. at 167-68. Both methods of federal encouragement blessed in New York -- "the carrot of conditional spending grants and the stick of preemption threats" -- preserves political accountability by permitting a State to reject participation in the federal initiative. See Koog v. United States, supra, 79 F.3d at 456. When the residents of a State decline a federal grant or choose not to regulate a particular activity despite a preemption threat,

Congress is forced to act for itself and thus to "bear the expense of a federally mandated regulatory program." New York v. United States, supra, 505 U.S. at 168. Because sections 434 and 642 amount "effectively to forced legislation, and this violates one of the most important of all principles of federalism, it does not matter 'how powerful the federal interest involved', nor how much the intrusion may be downplayed." Koog v. United States, supra, 79 F.3d at 462, citing New York v. United States, supra, 505 U.S. at 178. The Court in New York "provided for no de minimus exception." Printz v. United States, supra, 854 F.Supp., at 1517.

Congress's bypass of the executive and legislative processes here constitutes a greater intrusion than forcing the enactment of legislation because it invades the sovereignty of State and local governments, without even a pretext of a federal incentive or consent by the States' residents. If Congress has the power here asserted, it would never have to encourage States to adopt legislation because it could simply "eliminate the middle man" and pass federal legislation which directly enlists State and local employees to carry out the desired policies of the federal government, if they so choose.

This congressionally-imposed displacement of the policy choices of the local electorate demonstrates a lack of respect for the local political process and diminishes the dignity of State sovereignty. The very principle of State sovereignty is that local government will be more sensitive and responsive to the particular needs of its community. See Gregory v. Ashcroft, 501 U.S. 452, 457-58 (1991). As such, policy decisions are to be carried out according to the dictates of local government rather than those of the federal

government. It is the ability to reject the role envisioned for them by Congress that enables the States and their political subdivisions to maintain control over their policies. See New York v. United States, supra, 505 U.S., at 168; Koog v. United States, supra, 79 F.3d, at 456.

The elected officials of the City of New York will bear the brunt of public disapproval for the consequences of the federally-imposed policy, notwithstanding that Congress has stripped them of their ability to implement the policy embodied in Executive Order No. 124 according to the views of their constituents. Members of Congress may insulate themselves from the electoral ramifications of their decision, while taking credit for increased statistics on deported immigrants without having to ask their constituents to pay for the salaries of the conscripted State and local employees through higher federal taxes.

It has never been in dispute in this litigation, as noted above, that this federal policy undermines the City's ability to carry out its police power functions in heatlh and welfare. If the Second Circuit's conclusion is upheld, it would be inconsistent with the Tenth Amendment's guarantee.

CONCLUSION

FOR THE FOREGOING REASONS, THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE GRANTED.

New York, New York
August 10, 1999

Respectfully submitted,

MICHAEL D. HESS
Corporation Counsel of the
City of New York
Attorney for Petitioners
100 Church Street
New York, New York 10007
(212) 788-0835 or 1010

LEONARD J. KOERNER,*
EDWARD F.X. HART,
of Counsel.

*Counsel of Record.

Supreme Court, U.S.
FILED
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No. 99 328

IN THE
SUPREME COURT OF THE UNITED STATES

THE CITY OF NEW YORK, and RUDOLPH GIULIANI, as Mayor of the City of New York,

Petitioners,

- against -

THE UNITED STATES OF AMERICA, and JANET RENO, as Attorney General of the United States,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

APPENDIX TO THE PETITION FOR A WRIT OF CERTIORARI

MICHAEL D. HESS
Corporation Counsel for the
City of New York
Attorney for Petitioners
100 Church Street
New York, N.Y. 10007
(212) 788-0835 or 1010

LEONARD J. KOERNER,*
EDWARD F. X. HART,
of Counsel.

August 10, 1999.
*Counsel of Record

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

August Term, 1997
(Argued: June 11, 1998 Decided: May 27, 1999)
Docket No. 97-6182

THE CITY OF NEW YORK and RUDOLPH GIULIANI, as Mayor of the City of New York,

Plaintiffs-Appellants,

-v.-

THE UNITED STATES OF AMERICA and JANET RENO,
as Attorney General of the United States,

Defendants-Appellees.

B e f o r e :

WINTER, *Chief Judge*,
WALKER, and JACOBS, *Circuit Judges*.

Appeal from a judgment dismissing a complaint in the United States District Court for the Southern District of New York (John G. Koeltl, *Judge*). Appellants challenged the facial constitutionally of Section 434 of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 and Section 642 of the Illegal Immigration Reform and

Immigrant Responsibility Act of 1996. These Sections invalidate state and local rules that prohibit government employees from voluntarily providing information about illegal aliens to the INS. We hold that Sections 434 and 642 are not facially unconstitutional and affirm.

DEBORAH R. DOUGLAS, Assistant Corporation Counsel for the City of New York (Jeffrey D. Friedlander, Acting Corporation Counsel, and Kristin M. Helmers, Assistant Corporation Counsel, of counsel), New York, New York, *for Plaintiffs-Appellants*.

MARTIN J. SIEGEL, Assistant United States Attorney for the Southern District of New York (Mary Jo White, United States Attorney, and Sara L. Shudofsky, Assistant United States Attorney, of counsel), New York, New York, for *Defendants-Appellees*.

Helaine Barnett, The Legal Aid Society (Scott A. Rosenberg, Hwan-Hui Helen Lee, of counsel), New York, New York, *for Amicus Curiae The Legal Aid Society in support of Plaintiffs-Appellants*.

WINTER, *Chief Judge*:

The City of New York prohibits its employees from voluntarily providing federal immigration authorities with information concerning the immigration status of any alien.

In 1996, Congress passed Section 434 of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 ("Welfare Reform Act"), Pub. L. No. 104-193, 110 Stat. 2105 (1996), and Section 642 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("Immigration Reform Act"), Pub. L. No. 104-208, 110 Stat. 3009 (1996). These Sections prohibit state and local governments from limiting their employees in the voluntary provision of information about the immigration status of aliens to the Immigration and Naturalization Service ("INS"). The City and Mayor Rudolph Giuliani (collectively, "the City") appeal from Judge Koeltl's dismissal of their action challenging the facial constitutionality of those enactments. We hold that both Sections survive the City's facial challenge and therefore affirm.

BACKGROUND

In August 1989, Edward Koch, then New York City's mayor, issued Executive Order No. 124. The Order prohibits any City officer or employee from transmitting information regarding the immigration status of any individual to federal immigration authorities unless: (i) such employee's agency is required by law to disclose such information, (ii) an alien explicitly authorizes a City agency to verify his or her immigration status, or (iii) an alien is suspected by a City agency of engaging in criminal behavior.[1] However, even if a City agency's line workers

---

[1] Executive Order 124 provides in pertinent part:

(continued...)

[1] (...continued)

Section 2. Confidentiality of Information Respecting Aliens.

a. No City officer or employee shall transmit information respecting any alien to federal immigration authorities unless

(1) such officer's or employee's agency is required by law to disclose information respecting such alien, or

(2) such agency has been authorized, in writing signed by such alien, to verify such alien's immigration status, or

(3) such alien is suspected by such agency of engaging in criminal activity, including an attempt to obtain public assistance benefits through the use of fraudulent documents.

b. Each agency shall designate one or more officers or employees who shall be responsible for receiving reports from such agency's line workers on aliens suspected of criminal activity and for determining, on a case by case basis, what action, if any, to take on such reports. No such determination shall be made by any line worker, nor shall any line worker transmit information respecting any alien directly to federal immigration authorities.

(continued...)

suspect an alien of criminal activity, the Executive Order prohibits them from transmitting information regarding such alien directly to the federal authorities. Instead, it requires each agency to designate certain officers or employees to receive reports on suspected criminal activity from line workers and to determine on a case by case basis what action, if any, to take on such reports. Mayor Koch's successors, David Dinkins and Rudolph Giuliani, have reissued the Executive Order.

On August 22, 1996, the President signed the Welfare Reform Act into law. Section 434, entitled "Communication between State and Local Government Agencies and the Immigration and Naturalization Service," provides that no state or local government entity may be

---

[1] (...continued)

c. Enforcement agencies, including the Police Department and the Department of Correction, shall continue to cooperate with federal authorities in investigating and apprehending aliens suspected of criminal activity. However, such agencies shall not transmit to federal authorities information respecting any alien who is the victim of a crime.

Section 3. Availability of City Services to Aliens.

Any service provided by a City agency shall be made available to all aliens who are otherwise eligible for such service unless such agency is required by law to deny eligibility for such service to aliens. Every City agency shall encourage aliens to make use of those services provided by such agency for which aliens are not denied eligibility by law.

restricted from exchanging information with the INS regarding the immigration status, lawful or unlawful, of individuals in the United States.[2] The Conference Report accompanying the bill explained: "The conferees intend to give State and local officials the authority to communicate with the INS regarding the presence, whereabouts, or activities of illegal aliens. . . . The conferees believe that immigration law enforcement is as high a priority as other aspects of Federal law enforcement, and that illegal aliens do not have the right to remain in the United States undetected and unapprehended." H.R. Conf. Rep. No. 104-725, at 383 (1996), *reprinted in* 1996 U.S.C.C.A.N. 2649, 2771.

On September 30, 1996, the Immigration Reform Act was signed into law. Section 642, entitled "Communication between Government Agencies and the Immigration and the Naturalization Service," expands Section 434 by prohibiting any government entity or official from restricting any other government entity or official from exchanging information with the INS about the immigration or citizenship status of any individual. It further provides that no governmental agency--federal, state, or local--may be prohibited from: (i) exchanging such

---

[2] Section 434 provides:

> Notwithstanding any other provision of Federal, State, or local law, no State or local government entity may be prohibited, or in any way restricted, from sending to or receiving from the Immigration and Naturalization Service information regarding the immigration status, lawful or unlawful, or an alien in the United States.

information with the INS; (ii) maintaining such information; or (iii) exchanging such information with any other federal, state, or local government entity.[3] The Report of the Senate

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[3] Section 642 of the Immigration Reform Act provides:

> (a) IN GENERAL.--Notwithstanding any other provision of Federal, State, or local government entity or official may not prohibit, or in any way restrict, any government entity or official from sending to, or receiving from, the Immigration and Naturalization Service information regarding the citizenship or immigration status, lawful or unlawful, of any individual.
>
> (b) ADDITIONAL AUTHORITY OF GOVERNMENT ENTITIES.--Notwithstanding any other provision of Federal, State, or local law, no person or agency may prohibit, or in any way restrict, a Federal, State, or local government entity from doing any of the following with respect to information regarding the immigration status, lawful or unlawful, of any individual:
>
> (1) Sending such information to, or requesting or receiving such information from, the Immigration and Naturalization Service.
>
> (2) Maintaining such information.
>
> (3) Exchanging such information with any other Federal, State, or local government entity.

(continued...)

Judiciary Committee accompanying the Senate Bill explained that the "acquisition, maintenance, and exchange of immigration-related information by State and local agencies is consistent with, and potentially of considerable assistance to, the Federal regulation of immigration and the achieving of the purposes and objectives of the Immigration and Nationality Act." S. Rep. No. 104-249, at 19-20 (1996).

Eleven days after the Immigration Reform Act was signed by the President, the City commenced this action against the United States (the "Government") for declaratory and injunctive relief, claiming that Sections 434 and 642 do not invalidate the City's Executive Order because they are facially unconstitutional. Specifically, the City contended that Sections 434 and 642, which are directed at state and local government entities (or officials) and not private parties, violate the Tenth Amendment because they directly forbid state and local government entities from controlling the use of information regarding the immigration status of individuals obtained in the course of their official business. The City maintained further that such interference with a state's control over its own

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[3] (...continued)

> (c) OBLIGATION TO RESPOND TO INQUIRIES.--The Immigration and Naturalization Service shall respond to an inquiry by a Federal, State, or local government agency, seeking to verify or ascertain the citizenship or immigration status of any individual within the jurisdiction of the agency for any purpose authorized by law, by providing the requested verification or status information.

workforce-*i.e.*, over its power to determine the duties of its employees with regard to confidential information that the employees acquire in their official capacity -- lies outside Congress's plenary power over immigration. Finally, the City argued that Sections 434 and 642 violate the Guarantee Clause of Article IV of the Constitution.

After both parties moved for judgment on the pleadings under Fed. R. Civ. P. 12(c), the district court granted the Government's motion and dismissed the City's claims, holding that Sections 434 and 642 violate neither the Tenth Amendment nor the Guarantee Clause. This appeal followed.

DISCUSSION

We review *de novo* a district court's dismissal of a complaint under Fed. R. Civ. P. 12(c). *See Sheppard v. Beerman*, 94 F.3d 823, 827 (2d Cir. 1996).

The City's burden in this case is substantial. As the Supreme Court has noted, "[a] facial challenge to a legislative Act is . . . the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid." *United States v. Salerno*, 481 U.S. 739, 745 (1987). Because the Supreme Court has not recognized an "overbreadth" doctrine outside the limited context of the First Amendment, a showing that a statute "might operate unconstitutionally under some conceivable set of circumstances is insufficient to render it wholly invalid." *General Elec. Co. v. New York State Dep't of Labor*, 936 F.2d 1448, 1456 (2d Cir. 1991); *accord United States v. Sage*, 92 F.3d 101, 106 (2d Cir. 1996).

A. *The Tenth Amendment Claim*

The Tenth Amendment provides that "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. Const. amend. X. In *New York v. United States*, 505 U.S. 144, 157 (1992), the Supreme Court viewed the Tenth Amendment as "confirm[ing] that the power of the Federal Government is subject to limits that may, in a given instance, reserve power to the States." For example, the Tenth Amendment limits the power of Congress to regulate by "'directly compelling [states] to enact and enforce a federal regulatory program.' " *Id.* at 161 (quoting *Hodel v. Virginia Surface Mining and Reclamation Ass'n,* 452 U.S. 264, 288 (1981)). State governments, the Court explained, are not federal regulatory agencies. *See id.* at 163, 178. Thus, however plenary Congress's power to legislate in a particular area may be, the Tenth Amendment prohibits Congress from commanding states to administer a federal regulatory program in that area. Moreover, "Congress cannot circumvent that prohibition by conscripting the State's officers directly." *Printz v. United States,* 117 S. Ct. 2365, 2384 (1997).

The City does not dispute that Congress has plenary power to legislate on the subject of aliens. As the Supreme Court explained in *Takahashi v. Fish and Game Commission:*

> The Federal Government has broad constitutional powers in determining what aliens shall be admitted to the United States, the period they may remain, regulation of their conduct before

> naturalization, and the terms and conditions of their naturalization.

334 U.S. 410, 419 (1948); *see also Hines v. Davidowitz*, 312 U.S. 52, 66 (1941) ("the regulation of aliens is so intimately blended and intertwined with responsibilities of the national government" that federal policy in this area always takes precedence over state policy). Rather, the City asserts that the Tenth Amendment prohibits Congress from exercising its power to regulate aliens in a way that forbids states and localities from enacting laws that essentially restrict state and local officials from cooperating in the federal regulation of aliens, even on a voluntary basis.

The City's Tenth Amendment claim rests on two basic arguments. The first is that the scope of state sovereignty under the Amendment includes the power to choose not to participate in federal regulatory programs and that such power in turn includes the authority to forbid state or local agencies, officials, and employees from aiding such a program even on a voluntary basis. The second argument is that the federal government may not use its powers to legislate in certain areas to disrupt the actual operation of state and local government by, for example, regulating the use of state and local resources- here officially-acquired information- and/or the duties or responsibilities of state and local employees.

The City's scope-of-state-sovereignty argument relies principally upon language in *Printz*, 117 S. Ct. at 2384, and *New York*, 505 U.S. at 168, that suggests that states may not be denied a bona fide choice as to whether or not to participate in a federal regulatory program. In

the City's view, such a choice includes the power to forbid even voluntary cooperation by state and local officials and workers in such a federal program. We do not read these cases so broadly.

Unlike Sections 434 and 642, the federal programs in *Printz* and *New York* conscripted states (or their officers) to enact or administer federal regulatory programs. *See Printz*, 117 S.Ct. at 2376 (distinguishing federal directives to states that "require only the provision of information to the Federal Government" from those that "force"[ ] [the] participation of the States' executive in the actual administration of a federal program," even though both kinds of directive leave states with no "choice" but to comply). The central teaching of these cases is that "even where Congress has the authority under the Constitution to pass laws requiring or prohibiting certain acts, it lacks the power directly to compel the States to require or prohibit those acts." *New York*, 505 U.S. at 166. Congress may not, therefore, directly compel states or localities to enact or to administer policies or programs adopted by the federal government. It may not directly shift to the states enforcement and administrative responsibilities allocated to the federal government by the Constitution. Such a reallocation would not only diminish the political accountability of both state and federal officers, *see New York*, 505 U.S. at 168; *Printz*, 117 S. Ct. at 2382, but it would also "compromise the structural framework of dual sovereignty," *Printz*, 117 S. Ct. at 2383, and separation of powers, *see id.* at 2378 ("[T]he power of the President would be subject to reduction, if Congress could act as effectively without the President as with him, by simply requiring state officers to execute its laws."). Thus, while Congress may condition federal funding on state

compliance with a federal regulatory scheme or preempt state powers in particular areas, *see New York*, 505 U.S. at 166-68, it may not directly force states to assume enforcement or administrative responsibilities constitutionally vested in the federal government.[4]

In the case of Sections 434 and 642, Congress has not compelled state and local governments to enact or administer any federal regulatory program. Nor has it affirmatively conscripted states, localities, or their employees into the federal government's service. These Sections do not directly compel states or localities to require or prohibit anything. Rather, they prohibit state and local governmental entities or officials only from directly restricting the voluntary exchange of immigration information with the INS. *See Printz*, 117 S. Ct. at 2376.

The City's sovereignty argument asks us to turn the Tenth Amendment's shield against the federal government's using state and local governments to enact and administer federal programs into a sword allowing states and localities to engage in passive resistance that frustrates federal

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[4] This prohibition stands even if state officials "consent" to such federal directives. *See New York*, 505 U.S. at 182 ("Where Congress exceeds its authority relative to the States, . . . the departure from the constitutional plan cannot be ratified by the 'consent' of state officials. . . . State officials thus cannot consent to the enlargement of the powers of Congress beyond those enumerated in the Constitution."). Again, "consent" and "choice" are not, by themselves, significant for purposes of Tenth Amendment analysis.

programs. If Congress may not forbid states from outlawing even voluntary cooperation with federal programs by state and local officials, states will at times have the power to frustrate effectuation of some programs. Absent any cooperation at all from local officials, some federal programs may fail or fall short of their goals unless federal officials resort to legal processes in every routine or trivial matter, often a practical impossibility. For example, resistance to *Brown v. Board of Education*, 347 U.S. 483 (1954), was often in the nature of a refusal by local government to cooperate until under a court order to do so.

A system of dual sovereignties cannot work without informed, extensive, and cooperative interaction of a voluntary nature between sovereign systems for the mutual benefit of each system. The operation of dual sovereigns thus involves mutual dependencies as well as differing political and policy goals. Without the Constitution, each sovereign could, to a degree, hold the other hostage by selectively withholding voluntary cooperation as to a particular program(s). The potential for deadlock thus inheres in dual sovereignties, but the Constitution has resolved that problem in the Supremacy Clause, which bars states from taking actions that frustrate federal laws and regulatory schemes. *See Barnett Bank v. Nelson*, 517 U.S. 25, 31 (1996) (citing *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)).

We therefore hold that states do not retain under the Tenth Amendment an untrammeled right to forbid all voluntary cooperation by state or local officials with particular federal programs. Given that the City's challenge to Sections 434 and 642 is facial and that the Executive Order is on its face a mandatory non-cooperation

directive relating solely to a particular federal program, we need not locate with precision the line between invalid federal measures that seek to impress state and local governments into the administration of federal programs and valid federal measures that prohibit states from compelling passive resistance to particular federal programs. It suffices to say that, at least in the context of the City's facial challenge, Sections 434 and 642 are of the latter variety.

We turn now to the argument that Sections 434 and 642 offend the Tenth Amendment because they interfere with the operations of state and local government by regulating: (i) the use of confidential information that state and local governments acquire in the course of official business and that therefore belongs to the particular governmental entity and (ii) the scope and nature of the duties of employees of state and local governments regarding such information.

In support of its position regarding interference with the use of officially acquired information, the City argues that *Printz* invalidated certain provisions of the Brady Handgun Violence Prevention Act on the ground that "[t]he Brady Act does not merely require [chief law enforcement officers] to report information in their private possession . . . [but also] requires them to provide *information that belongs to the State and is available to them only in their official capacity.*" *Printz*, 117 S. Ct. at 2383 n.17 (emphasis added). Thus, the City argues, although Sections 434 and 642 do not require any state or local official to provide the INS with information that belongs to state and local government, these provisions nevertheless eviscerate its control over such information.

With regard to its argument concerning its power to direct its workforce, the City argues that inherent in our dual-sovereignty system is the power of state and local governments to determine the duties and responsibilities of their employees. In particular, it relies on *Gregory v. Ashcroft*, which stated:

> [t]hrough the structure of its government, and the character of those who exercise government authority, a State defines itself as a sovereign. "It is obviously essential to the independence of the States, and to their peace and tranquility, that their power to prescribe the qualifications of their own officers . . . should be exclusive, and free from external interference, except so far as plainly provided by the Constitution of the United States."

501 U.S. 452, 460 (1991) (quoting *Taylor v. Beckham*, 178 U.S. 548, 570-71 (1900)). Moreover, "[w]hatever the outer limits of state sovereignty may be, it surely encompasses the right to set the duties of office for state-created officials and to regulate the internal affairs of governmental bodies." *Koog v. United States*, 79 F.3d 452, 460 (5th Cir. 1996).

The City's concerns are not insubstantial. The obtaining of pertinent information, which is essential to the performance of a wide variety of state and local governmental functions, may in some cases be difficult or impossible if some expectation of confidentiality is not preserved. Preserving confidentiality may in turn require that state and local governments regulate the use of such information by their employees. Finally, it is undeniable

that Sections 434 and 642 do interfere with the City's control over confidential information obtained in the course of municipal business and over its employees' use of such information.

Nevertheless, the City has chosen to litigate this issue in a way that fails to demonstrate an impermissible intrusion on state and local power to control information obtained in the course of official business or to regulate the duties and responsibilities of state and local governmental employees. On the present record, the only state and local policy proffered by the City as disrupted by Sections 434 and 642 is the Executive Order described above. The City's facial challenge thus rests entirely on the interference of Sections 434 and 642 with that Executive Order and that Order alone.

The Executive Order is not a general policy that limits the disclosure of confidential information to only specific persons or agencies or prohibits such dissemination generally. Rather, it applies only to information about immigration status and bars City employees from voluntarily providing such information only to federal immigration officials. On its face, it singles out a particular federal policy for non-cooperation while allowing City employees to share freely the information in question with the rest of the world. It imposes a policy of no-voluntary-cooperation that does not protect confidential information generally but does operate to reduce the effectiveness of a federal policy. For example, the City argues that the Executive Order is essential to the provision of municipal services and to the reporting of crimes because these governmental functions often require the obtaining of information from aliens who will be reluctant

to give it absent assurances of confidentiality. But again, the Executive Order does not on its face prevent the sharing of information with anyone outside the INS.

At oral argument, the panel invited the City to inform us whether the information covered by the Executive Order might in fact be subject to other confidential provisions that would prevent its dissemination generally. If so, the Executive Order might be viewed more as an explanatory measure designed to reassure aliens that information they might impart was truly confidential, even from the INS. In that context, the Executive Order might seem more integral to the operation of City government, and Sections 434 and 642 might seem more intrusive. We invited the City to inform us by letter of other such confidentiality policies. However, the City's response provided us only with a list of policies that might or might not protect information about immigration status. Noting that "[e]xisting confidentiality statutes and regulations are numerous and . . . pervasive throughout State and City government," Appellants' Post-Argument Letter Brief at 1, the City's letter left it to us to determine the answer to our inquiry. We decline the task and limit our inquiry solely to the facial effect of Sections 434 and 642 on the Executive Order.

Given the circumscribed nature of our inquiry, we uphold Sections 434 and 642. Essentially, the foregoing discussion relating to the power of states to command passive resistance to federal programs governs the analysis here. The effect of those Sections here is to nullify an Order that singles out and forbids voluntary cooperation with federal immigration officials. Whether these Sections would survive a constitutional challenge in the context of

generalized confidentiality policies that are necessary to the performance of legitimate municipal functions and that include federal immigration status is not before us and we offer no opinion on that question.

B. *The Republican Form of Government Claim*

The City also contends that Sections 434 and 642 violate the Constitution's Guarantee Clause, which provides: "The United States shall guarantee to every State in this Union a Republican Form of Government." *U.S. Const. art. IV, § 4.* The City argues that by denying it the opportunity to enact and enforce its Executive Order, Sections 434 and 642 impermissibly interfere with the City's republican form of government.

Even assuming the justiciability of this claim, *cf. New York*, 505 U.S. at 183-86, for the reasons stated above, we find on this record that Section 434's and 642's interference with the city's Executive Order is entirely permissible and in no way alters the form of New York City's government.

We therefore affirm.

COMPLAINT, DATED OCTOBER 11, 1996
(pp. 20-44)

REPRODUCED FOLLOWING

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------x

THE CITY OF NEW YORK, and RUDOLPH W. GIULIANI, as the Mayor of the City of New York,

COMPLAINT

Civil Action No.

Plaintiffs,

- against -

THE UNITED STATES OF AMERICA, and JANET RENO, as Attorney General of the United States,

Defendants.

----------x

PRELIMINARY STATEMENT

1. This is an action for declaratory and injunctive relief challenging two federal statutory provisions that encroach on the power of the City of New York ("the City") to determine policies to ensure public health and

safety and regulate its own workforce. These provisions prohibit the City from continuing its well-considered policy, embodied in Executive Order 124 ("E.O. 124"), barring City employees from disclosing to federal immigration authorities the immigration status of aliens who come to their attention, unless required to do so by law, and more specifically barring the New York City Police Department from reporting the immigration status of victims of crime. The reasons for this policy are evident: undocumented aliens who are witnesses to or victims of crime must not be deterred from coming forward for fear of deportation, nor should undocumented aliens who are infected with contagious diseases be deterred from seeking treatment, nor should undocumented alien children be afraid to attend public schools and forfeit their right to an education. The safety and public health of the entire City are dependent on all residents, regardless of their

immigration status, cooperating with the government and securing government services to which they are entitled. The federal statutes at issue prohibit the City from continuing this particular policy and thus require the City to allow its officials to provide information on the immigration status of aliens to the Immigration and Naturalization Service ("INS").

2. These federal laws together prohibit States and local government entities and their officials from prohibiting such entities and officials from sending information to the INS regarding the immigration status of an alien in the United States. These provisions run afoul of principles of federalism and the Tenth Amendment and Guarantee Clause of the United States Constitution because (1) they directly prohibit States and localities from engaging in the central sovereign process of passing laws or otherwise determining policy; and (2) they usurp States'

and local governments' administration of core functions of government, including the provision of police protection and regulation of their own workforces, in a statute that is not of general applicability.

JURISDICTION AND VENUE

3. This Court has jurisdiction pursuant to 28 U.S.C. ¶ 1331, because this case arises under the Constitution of the United States.

4. Declaratory judgment is sought pursuant to 28 U.S.C. §§ 2201-2202.

5. Venue is proper in this district under 28 U.S.C.§ 1391(e).

PARTIES

6. Plaintiff the City of New York ("the City") is a municipal corporation created by the laws of the State of New York with the power to sue and be sued.

7. Plaintiff Rudolph W. Giuliani is the Mayor of the City of New York. As such, he is the Chief Executive Officer of the City and thus has the authority to issue executive orders to implement City policies and to manage the City's executive agencies, officers and employees.

8. Defendant the United States of America is a sovereign nation with the powers and duties specified in the Constitution of the United States and Acts of Congress.

9. Defendant Janet Reno is the Attorney General of the United States, and, as such, is charged with the responsibility to enforce the laws enacted by the United States Congress.

FACTS

10. By the INS's own estimate, published in its 1993 Statistical Yearbook, there were 449,000 undocumented aliens residing in New York State as of

October 1992. The INS further has estimated that the number of undocumented aliens is growing at the rate of 41,000 annually. Thus, as of October 1993, there were an estimated 490,000 undocumented aliens living in New York State. On information and belief, approximately 80% of that total number of undocumented aliens -- roughly 400,000 -- resided in New York City as of that date.

11. According to a study released by the Urban Institute in 1994, approximately 21.6% of the total number of undocumented aliens residing in New York State as of October 1993 were of school age. Thus, as of October 1993, approximately 85,000 undocumented aliens in the City were of school age.

12. Since, according to the INS, the number of undocumented aliens in New York State has been growing annually, on information and belief, the numbers of undocumented alien City residents and undocumented alien

residents of school age are greater than the October 1993 estimates.

13. On information and belief, there are more than 4,000 undocumented aliens who pass through City jails every year, all of whom are reported to the INS, but the INS only manages to deport approximately two to three hundred of these undocumented aliens annually. On information and belief, the INS has deported almost no undocumented aliens residing gin the City who are not convicted criminals. Thus, it is a fact of life that law-abiding undocumented aliens are among the City's long term residents and therefore are part of the fabric of New York City society.

14. On information and belief, in the City, undocumented aliens live in neighborhoods comprised of undocumented aliens, legal aliens and United States citizens intermingled together.

15. On information and belief, in neighborhoods in which new, legal immigrants have settled, the concentration of undocumented aliens is particularly high. This is due to the fact that frequently one family or household consists of both legal and undocumented aliens. Indeed, many families are comprised of legal aliens, undocumented aliens, and U.S. citizens.

16. Undocumented aliens mix with other City residents in all walks of life. In particular, undocumented alien children attend public school with legal immigrants and citizens, and mix in day care centers, playgrounds, on public transportation, and in many other locations throughout the City.

17. This intermingling of undocumented aliens and other City residents has profound consequences for the public health and safety of the City.

18. Undocumented aliens may be witnesses to or victims of crime in their communities. Indeed, on information and belief, because of their undocumented status, undocumented aliens are particularly vulnerable to victimization. These aliens need to feel free to report crimes without fear of retaliation. If the City cannot guarantee undocumented aliens that they may report crimes without fear of their undocumented status being revealed to the INS, undocumented aliens will be more reluctant to report crimes. Reducing the amount of information received by the police reduces the ability of the City to protect all of its residents -- whether they be undocumented aliens, legal aliens or citizens.

19. Undocumented alien children must be free to attend public school without fear that their undocumented status or that of their relatives will be revealed and communicated to the INS. In the worst case, children who

do not receive an education will be more likely to turn to crime. Others deprived of an education, many of whom will eventually legalize their status, will have great difficulty finding employment, will therefore not be able to contribute to the City's economy, and may become dependent on public assistance.

20. Further, undocumented aliens must be free to receive health care without fear of their undocumented status being communicated to the INS. Discouraging them from obtaining health care, particularly for those with contagious diseases, would have profound consequences for the health of the entire City community. For example, if those undocumented aliens with tuberculosis do not receive medical care, they may infect others in their community. Many childhood diseases are highly contagious, and undocumented alien children who mingle with other children and do not receive health care will infect other

children. Contagious diseases do not discriminate based on whether an individual has a green card.

21. Undocumented aliens also often make up essential links in the investigative chain necessary to trace outbreaks of contagious diseases such as tuberculosis or sexually transmitted diseases or other public health problems such as food poisoning. Indeed, the New York City Department of Health seeks to establish the initial source of contagion for every case of tuberculosis reported to it. For such investigations to be successful, it is essential that investigators from the Department of Health receive full cooperation and truthful information from the people they interview. If undocumented aliens are fearful and reluctant to cooperate with public health officers, the health of all City residents is jeopardized.

22. In sum, if undocumented aliens are cut off from medical care, education and police protection, all City residents are endangered.

EXECUTIVE ORDER 124

23. To ensure that undocumented aliens feel free to seek police protection, attend schools, and seek medical care, on August 7, 1989, former Mayor to the City of New York, Edward I. Koch, issued Executive Order 124. ("E.O. 124") This Executive Order was reissued by both of Mayor Koch's successors, David N. Dinkins and the City's current Mayor, Rudolph W. Giuliani.

24. In pertinent part, the Executive Order reads as follows (The entire Order is attached hereto as Exhibit A):

> Section 2. Confidentiality of Information Respecting Aliens.
>
> a. No City officer or employee shall transmit information respecting any alien to federal immigration authorities unless

(1) such officer's or employee's agency is required by law to disclose information respecting such alien, or

(2) such agency has been authorized, in writing signed by such alien, to verify such alien's immigration status, or

(3) such alien is suspected by such agency of engaging in criminal activity, including any attempt to obtain public assistance benefits through the use of fraudulent documents.

b. Each agency shall designate one or more officers or employees who shall be responsible for receiving reports from such agency's line workers on aliens suspected of criminal activity and for determining, on a case by case basis, what action, if any, to take on such reports. No such determination shall be made by any line worker, nor shall any line worker transmit information respecting any alien directly to federal immigration authorities.

c. Enforcement agencies, including the Police Department and the Department of Correction, shall continue to cooperate with federal authorities in investigating and apprehending aliens suspected of criminal activity. However, such agencies shall not transmit to federal authorities information respecting any alien who is the victim of a crime.

Section 3. Availability of City Services to Aliens. Any service provided by a City agency shall be made available to all aliens who are otherwise

> eligible for such service unless such agency is required by law to deny eligibility for such service to aliens. Every City agency shall encourage aliens to make use of those services provided by such agency for which aliens are not denied eligibility by law.

25. E.O. 124 has helped to make the City a safer and more healthful environment, because it has allowed law-abiding undocumented aliens to report crime, secure medical care and attend schools without fear of reprisal, thereby benefiting the larger City community.

26. E.O. 124 ensures that City officials, who do not have the expertise or authority to determine immigration status, are not put in the position of being permitted to determine that status and to report those ad hoc, inaccurate and inconsistent determinations to the INS.

THE FEDERAL STATUTES

27. On August 22, 1996, the "Personal Responsibility and Work Opportunity Act of 1996 ("the Welfare Reform Act") was signed into law.

28. Section 434 of the Welfare Reform Act, entitled "Communication between State and Local Government Agencies and the Immigration and Naturalization Service," reads as follows:

> Notwithstanding any other provision of Federal, State or local law, no State or local government entity may be prohibited, or in any way restricted, from sending to or receiving from the Immigration and Naturalization Service information regarding the immigration status, lawful or unlawful, of an alien in the United States.

29. As explained in the Conference Report to the bill, this provision "is designed to prevent any State or local law, ordinance, executive order, policy, constitutional provision, or decision of any Federal or State court that prohibits or in any way restricts any communication between State and local officials and the INS."

30. On September 30, 1996, the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("Immigration Reform Act"), a division of the

Omnibus Appropriations Act for Fiscal Year 1997, was signed into law.

31. Section 642 of the Immigration Reform Act, entitled "Communication between Government Agencies and the Immigration and Naturalization Service," reads as follows:.

> (a) IN GENERAL. --Notwithstanding any other provision of Federal, State or local law, a Federal, State or local government entity or official may not prohibit, or in any way restrict, any government entity or official from sending to, or receiving from, the Immigration and Naturalization Service information regarding the citizenship or immigration status, lawful or unlawful, of any individual.
> (b) ADDITIONAL AUTHORITY OF GOVERNMENT ENTITIES. -- Notwithstanding any other provision of Federal, State or local law, no person or agency may prohibit, or in any way restrict, a Federal, State or local government entity from doing any of the following with respect to information regarding the immigration status, lawful or unlawful, of any individual:
>
> (1) Sending such information to, or requesting or receiving such information from, the Immigration and Naturalization Service.
>
> (2) Maintaining such information.
>
> (3) Exchanging such information with any other Federal, State or local government entity.

> (c) OBLIGATION TO RESPOND TO INQUIRIES. -- The Immigration and Naturalization Service shall respond to an inquiry by a Federal, State, or local government agency, seeking to verify to ascertain the citizenship or immigration status of any individual within the jurisdiction of the agency for any purpose authorized by law, by providing the requested verification or status information.

32. Section 434 of the Welfare Reform Act and section 642(a) and (b) of the Immigration Reform Act conflict with significant portions of E.O. 124 and otherwise prevent the City from passing legislation or otherwise making policy limiting its officials' authority to report the immigration status of individuals to the INS.

33. In practical terms, both Section 434 and section 642 will deter law-abiding undocumented aliens from coming into contact with local government employees, because the City will no longer be able to provide a guarantee that those aliens will not be reported to the INS.

34. Specifically, the provisions will deter law-abiding undocumented aliens from reporting crimes, sending their children to public school, cooperating with police department and public health investigators and seeking medical care for themselves and their children, hereby threatening the health and safety of the entire City.

FIRST CAUSE OF ACTION

35. Plaintiffs hereby repeat and reallege paragraphs 1-34.

36. The Tenth Amendment of the United States Constitution states that the powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

37. The Tenth Amendment incorporates the Framers' view that the federal government is but one component in our federalist system, and that States and

local governments are full partners in the functioning of that system. Principles of federalism embodied in the Tenth Amendment mandate that States and local governments be allowed to exercise their powers to pass legislation and otherwise enact policy, in order to remain politically accountable to the State and local electorate.

38. Section 434 of the Welfare Reform Act and section 642(a) and (b) of the Immigration Reform Act directly prohibit the City from engaging in the central sovereign process of passing laws or otherwise adopting a policy that prohibits or restricts its officials from sending information to the INS.

39. In so doing, they prevent the Mayor from exercising his authority to issue executive orders on this issue to ensure "the effectiveness and integrity of city government operations and [ ] establish and maintain such policies and procedures as are necessary and appropriate to

accomplish this responsibility including the implementation of effective systems of internal control by each agency and unit under the jurisdiction of the mayor." N.Y. City Charter, Chapter 1, section 8(a).

40. In so doing, they prevent the City Council from exercising its authority to pass legislation involving this issue. N.Y. City Charter, Chapter 2, section 21.

41. By prohibiting the City from issuing executive orders, enacting legislation or otherwise making policy regarding the reporting of undocumented aliens by City officials, the United States has commandeered the City's legislative and executive policy making apparatus, diminishing political accountability and violating principles of federalism and the Tenth Amendment of the United States Constitution.

SECOND CAUSE OF ACTION

42. Plaintiffs hereby repeat and reallege paragraphs 1-34.

43. The Tenth Amendment precludes the federal government from regulating the States as States, when such regulation interferes with core function of State and local government.

44. Section 434 of the Welfare Reform Act and section 642(a) and (b) of the Immigration Reform Act are targeted explicitly at State and local governments, and are not statutes of general applicability that incidentally affect States and localities while also regulating private individuals.

45. Section 434 and section 642(a) and (b) interfere with core functions of City government, including the ability of the City to exercise its police power to

provide for public health and safety and to control its own workforce.

46. By interfering with core functions of City government, by means of a statute directed only at States and localities and not at private individuals, the United States has violated principles of federalism and the Tenth Amendment of the United States Constitution.

THIRD CAUSE OF ACTION

47. Plaintiffs hereby repeat and reallege paragraphs 1-34.

48. Section 434 of the Welfare Reform Act and section 642(a) and (b) of the Immigration Reform Act interfere with the ability of States and local governments and their duly-elected officials to represent the electorate by engaging in the central sovereign process of passing legislation or otherwise enacting a policy that prohibits or restricts their officials from sending information to the INS.

49. In so doing, section 434 and section 642(a) and (b) violate Article IV, section 4 of the United States Constitution ("the Guarantee Clause"), which provides that the United States shall guarantee to every State a Republican Form of Government.

REQUEST FOR RELIEF

WHEREFORE, plaintiffs respectfully request this Court to enter judgment against defendants as follows:

1. Declaring that, pursuant to the Tenth Amendment and the Guarantee Clause, section 434 of the Welfare Reform Act and section 642(a) and (b) of the Immigration Reform Act are unconstitutional and void;

2. Enjoining defendants from enforcing section 434 of the Welfare Reform Act and section 642(a) and (b) of the Immigration Reform Act; and

3. Awarding such other relief as this Court deems just and proper.

Dated: New York, New York
October 11, 1996

MICHAEL D. HESS
Corporation Counsel of the
City of New York
Attorney for Plaintiffs
100 Church Street, Room 3-158
New York, New York 10007
(212) 788-0995

By: _____
Gail Rubin (GR2833)
Hilary B. Klein (HK0125)
Michael Henry (MH8209)
Assistant Corporation Counsels

ANSWER, DATED JANUARY 10, 1997
(pp. 45-52)

REPRODUCED FOLLOWING

MARY JO WHITE
United States Attorney for the
Southern District of New York
By: MARTIN J. SIEGEL (MJS - 4228)
Assistant United States Attorney
100 Church Street -- 19th Floor
New York, NY 10007
Tel. (212) 385-6256

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------x

THE CITY OF NEW YORK, and
RUDOLPH GIULIANI, as Mayor
of the City of New York,

Plaintiffs,

v.

THE UNITED STATES OF
AMERICA, and JANET RENO,
as Attorney General of the United
States,

Defendants.

ANSWER

96 Civ. 7758 (JGK)

----------x

Defendants, United States of America and Janet Reno, by their attorney, Mary Jo White, United States

Attorney for the Southern District of New York, answer plaintiffs' complaint on information and belief as follows:

1. Paragraph 1 of the complaint states legal conclusions to which no answer is required, except deny knowledge or information sufficient to form a belief as to the truth of the allegation that "the safety and public health of the entire City are dependent on all residents, regardless of their immigration status, cooperating with the government and securing government services to which they are entitled," and admit that "the federal statutes at issue prohibit the City from continuing this particular policy and thus require the City to allow its officials to provide information on the immigration status of aliens to the Immigration and Naturalization Service ("INS")."

2. Paragraph 2 of the complaint states legal conclusions to which no answer is required, except admit that "these federal laws together prohibit States and local

government entities and their officials from prohibiting such entities and officials from sending information to the INS regarding the immigration status of an alien in the United States."

3. Paragraphs 3, 4, and 5 of the complaint state legal conclusions to which no answer is required.

4. Deny knowledge of information sufficient to form a belief as to the truth of the allegations contained in paragraphs 6 and 7 of the complaint.

5. Admit the allegation contained in paragraphs 8 and 9 of the complaint.

6. Deny knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraphs 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 21, 22, 23, 24, 25, and 26 of the complaint.

7. Admit the allegations contained in paragraphs 27, 28, 29, 30, 31, and 32 of the complaint.

8. Deny knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraphs 33 and 34 of the complaint.

9. With respect to the allegations in paragraph 35 of the complaint, repeat and reallege the responses to paragraphs 1 through 34 as if fully set forth herein.

10. Admit the allegations contained in paragraph 36 of the complaint.

11. Paragraph 37 of the complaint states legal conclusions to which no answer is required.

12. Deny the allegations of paragraphs 38, 39, 40, and 41 of the complaint.

13. With respect to the allegations in paragraph 42 of the complaint, repeat and reallege the responses to paragraphs 1 through 41 as if fully set forth herein.

14. Paragraphs 43 and 44 of the complaint state legal conclusions to which no answer is required.

15. Deny the allegations of paragraphs 45 and 46 of the complaint.

16. With respect to the allegations in paragraph 47 of the complaint, repeat and reallege the responses to paragraphs 1 through 46 as if fully set forth herein.

17. Deny the allegations of paragraphs 48 and 49 of the complaint.

FIRST DEFENSE

18. The complaint fails to state a claim upon which relief can be granted.

SECOND DEFENSE

19. The claims contained in the complaint are barred by the Supremacy Clause of the United States Constitution, art. VI, cl. 2, 3.

THIRD DEFENSE

20. Plaintiffs lack standing to assert the claims contained in the complaint.

FOURTH DEFENSE

21. The complaint should be dismissed for lack of ripeness.

FIFTH DEFENSE

22. Janet Reno is not a proper party to this action.

WHEREFORE, defendants demand judgment dismissing the complaint, together with the costs and disbursements of this action, and such other relief as the Court deems just and proper.

Dated: New York, New York
January 10, 1997

MARY JO WHITE
United States Attorney for the
Southern District of New York
Attorney for Defendants

By: _____
MARTIN J. SIEGEL (MJS - 4228)
Assistant United States Attorney
100 Church Street -- 19th Floor
New York, NY 10007
Tel: (212) 385-6258

To: Gail Rubin
Office of the Corporation Counsel
100 Church Street, Room 3-158
New York, NY 10007

OPINION AND ORDER, DATED JULY 18, 1997
(pp. 53-88)

REPRODUCED FOLLOWING

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------x

THE CITY OF NEW YORK, and RUDOLPH GIULIANI, as Mayor of the City of New York,

Plaintiffs,

v.

THE UNITED STATES OF AMERICA, and JANET RENO, as Attorney General of the United States,

Defendants.

96 Civ. 7758 (JGK)

OPINION AND ORDER

----------x

APPEARANCES:

Plaintiffs by: Paul A. Crotty
Corporation Counsel of the City of New York
by: Gail Rubin, Hilary B. Klein
Assistant Corporation Counsel
100 Church Street, Room 3-158
New York, New York 10007
(212) 788-0995
(212) 788-1633

Defendants By: Mary Jo White
United States Attorney
for the Southern District of New York
by: Martin J. Siegel
Assistant United States Attorney
100 Church Street, 19th Floor
New York, New York 10007
(212) 385-6256
(212) 385-6252

Amicus Curiae: Helaine Barnett
The Legal Aid Society
by: Brigitte Laforest,
Scott Rosenberg
841 Broadway, 3rd Floor
New York, NY 10003
(212) 477-5010, ext. 233
(212) 577-3300

JOHN G. KOELTL, District Judge:

This is an action for declaratory and injunctive relief that presents a facial challenge to the constitutionality of two recently enacted federal statutory provisions that preempt a New York City (the "City") ordinance prohibiting City officials from sharing with federal authorities information about the immigration status of aliens. The plaintiffs allege that Section 434 of the

Personal Responsibility and Work Opportunity Reconciliation Act of 1996 and Section 642 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (collectively, "Sections 434 and 642") violate the Tenth Amendment[5] and the Guarantee Clause[6] of the United States Constitution, and principles of federalism, because "(1) they directly prohibit States and localities from engaging in the central sovereign process of passing laws or otherwise determining policy; and (2) they usurp States' and local governments' administration of core functions of government, including the provision of police

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[5] The Tenth Amendment provides; "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. Const. amend. X.

[6] The Guarantee Clause provides: "The United States shall guarantee to every State in this Union a Republican Form of Government ...." U.S. Const. art. IV, § 4

protection and regulation of their own workforces, in a statute that is not of general applicability." (Compl. ¶ 2.)

The plaintiffs and the defendants now move for judgement on the pleadings pursuant to Fed. R. Civ. P. 12(c).[7] For the reasons explained below, the defendants' motion is granted, and the plaintiffs' motion is denied.

---

[7] The Legal Aid Society also moves for an order granting leave to file a brief amicus curiae on behalf of the plaintiffs. A district court has broad discretion in deciding whether to accept an amicus brief. See Long Island Soundkeeper Fund, Inc. v. New York Athletic Club, No. 94 Civ. 0436, 1995 WL 358777, at *1 (S.D.N.Y. June 14, 1995); Concerned Area Residents for the Environment v. Southview Farm, 834 F. Supp. 1410, 1413 (W.D.N.Y. 1993); United States v. Ahmed, 788 F. Supp. 196, 198 n. 1 (S.D.N.Y.), aff'd, 980 F.2d 161 (2d Cir. 1992); United States v. Gotti, No. CR-90-1051, 1991 WL 5728, at *1 (E.D.N.Y. 1991). Because this is a motion for judgment on the pleadings, leave to file the brief amicus curiae is granted, but leave to file the accompanying declaration and attachments is denied.

I.

On a motion to dismiss, the factual allegations of the complaint are to be accepted as true and all reasonable inferences are construed in the plaintiff's favor. See Gant v . Wallingford Bd. of Educ., 69 F.3d 669, 673 (2d Cir. 1995); Hernandez v. Coughlin, 18 F.3d 133, 186 (2d Cir.), cert. denied, 513 U.S. 836 (1994). When reviewing a Rule 12(c) motion for judgment on the pleadings, the Court applies the same standards as on a Rule 12(b)(6) motion. The court "must view the pleadings in the light most favorable to, and draw all reasonable inferences in favor of, the nonmoving party." Davidson v. Flynn, 32 F.3d 27, 29 (2d Cir. 1994); Madonna v. United States, 878 F.2d 62, 65 (2d Cir. 1989); see also National Ass'n of Pharmaceutical Mfrs., Inc. v. Averst Labs., 850 F.2d 904, 909 n.2 (2d Cir. 1988) (indicating that the Court treats a motion for judgment on the pleadings as if it were a motion

to dismiss). A court should dismiss a complaint only "if 'it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.'" Valmonte v. Bane, 18 F.3d 992, 998 (2d Cir. 1994) (quoting Conley v. Gibson, 355 U.S. 41, 45-46, (1957)). Accordingly, the following facts are accepted as true for purposes of this motion.

On August 7, 1989, Edward I. Koch, then Mayor of the City of New York, issued Executive Order No. 124, which set forth the City policy concerning aliens. This Executive Order was reissued by both of Mayor Koch's successors. It provides in relevant part:

> Section 2. Confidentiality of Information Respecting Aliens.
>
> a. No City officer or employee shall transmit information respecting any alien to federal immigration authorities unless
>
> (1) such officer's or employee's agency is required by law to disclose information respecting such alien, or

(2) such agency has been authorized, in writing signed by such alien, to verify such alien's immigration status, or

(3) such alien is suspected by such agency of engaging in criminal activity, including an attempt to obtain public assistance benefits through the use of fraudulent documents.

b. Each agency shall designate one or more officers or employees who shall be responsible for receiving reports form such agency's line workers on aliens suspected of criminal activity and for determining, on a case by case basis, what action, if any, to take on such reports. No such determination shall be made by any line worker, nor shall any line worker transmit information respecting any alien directly to federal immigration authorities.

c. Enforcement agencies, including the Police Department and the Department of Correction, shall continue to cooperate with federal authorities in investigating and apprehending aliens suspected of criminal activity. However, such agencies shall not transmit to federal authorities information respecting any alien who is the victim of a crime.

Section 3. Availability of City Services to Aliens. Any service provided by a City agency shall be made available to all aliens who are otherwise eligible for such service unless such agency is required by law to deny eligibility for such service to aliens. Every City agency shall encourage aliens to make use of those services provided by such agency for which aliens are not denied eligibility by law.

Exec. Order 124.

On August 22, 1996, the Personal Responsibility and Work Opportunity Act of 1996 (the "Welfare Reform Act"), Pub. L. No. 104-193, 110 Stat. 2105 (1996), was signed into law. Section 434 of the Welfare Reform Act, entitled "Communication between State and Local Government Agencies and the Immigration and Naturalization Service," provides:

> Notwithstanding any other provision of Federal, State or local law, no State or local government entity may be prohibited, or in any way restricted, from sending to or receiving from the Immigration and Naturalization Service information regarding the immigration status, lawful or unlawful, of an alien in the United States.

As explained in the Conference Report to the bill,

> [The conference agreement] does not require, in and of itself, any government agency or law enforcement official to communicate with the INS.
>
> The conferees intend to give State and local officials the authority to communicate with the INS regarding the presence, whereabouts, or activities

> of illegal aliens.... The conferees believe that immigration law enforcement is as high a priority as other aspects of Federal law enforcement, and that illegal aliens do not have the right to remain in the United States undetected and unapprehended.

H.R. Conf. Rep. No. 725, 104th Cong., 2d Sess. 383 (1996), reprinted in 1996 U.S.C.C.A.N. 2649, 2771.

On September 30, 1996, the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (the "Immigration Reform Act"), Pub. L. No. 104-208, 110 Stat. 3009 (1996), was signed into law. Section 642 of the Immigration Reform Act, entitled "Communication Between Government Agencies and the Immigration and Naturalization Service," provides in relevant part:

> (a) IN GENERAL. -- Notwithstanding any other provision of Federal, State, or local law, a Federal, State, or local government entity or official may not prohibit, or in any way restrict, any government entity or official from sending to, or receiving from, the Immigration and Naturalization Service information regarding the citizenship or immigration status, lawful or unlawful, of any individual.

> (b) ADDITIONAL AUTHORITY OF GOVERNMENT ENTITIES. -- Notwithstanding any other provision of Federal, State, or local law, no person or agency may prohibit, or in any way restrict, a Federal, State, or local government entity from doing any of the following with respect to information regarding the immigration status, lawful or unlawful, of any individual:
>
> (1) Sending such information to, or requesting or receiving such information from, the Immigration and Naturalization Service.
>
> (2) Maintaining such information.
>
> (3) Exchanging such information with any other Federal, State, or local government entity.

As explained by the Senate Judiciary Committee,

> Effective immigration law enforcement requires a cooperative effort between all levels of government. The acquisition, maintenance, and exchange of immigration-related information by State and local agencies is consistent with, and potentially of considerable assistance to, the Federal regulation of immigration and the achieving of the purposes and objectives of the Immigration and Nationality Act.

S. Rep. No. 249, 104th Cong., 2d Sess. at 19-20 (1996).

II.

As an initial matter, the defendants argue that Congress's plenary power over aliens requires the plaintiffs' adherence to, and limits this Court's review of, Sections 434 and 642. The defendants contend that Congress's decision to advance the enforcement of immigration laws through optional information exchanges between state and local authorities and federal officials should be enforced, and any local law preventing those exchanges should be found invalid, because Congress has broad power to legislate on the subject of aliens. "Federal authority to regulate the status of aliens derives from various sources, including the Federal Governments' power '[t]o establish [a] uniform Rule of Naturalization,' U.S. Const., Art. I, § 8, cl. 4, its power ,[t]o regulate Commerce with foreign Nations,' id., cl. 3, and its broad authority over foreign affairs." Toll v. Moreno, 458 U.S.

1, 10 (1982) (citations omitted). As the Supreme Court explained:

> The Federal Government has broad constitutional powers in determining what aliens shall be admitted to the United States, the period they may remain, regulation of their conduct before naturalization, and the terms and conditions of their naturalization. Under the Constitution the states are granted no such powers; they can neither add to nor take from the conditions lawfully imposed by Congress upon admission, naturalization and residence of aliens in the United States or the several states.

Takahashi v. Fish & Game Comm'n, 334 U.S. 410, 419 91948) (citation omitted); see also Hines v. Davidowitz, 312 U.S. 52, 66 (1941) ("Consequently the regulation of aliens is so intimately blended and intertwined with responsibilities of the national government that where it acts, and the state also acts on the same subject, 'the act of congress, or the treaty, is supreme; and the law of the state, though enacted in the exercise of powers not controverted, must yield to it.'") (quoting Gibbons v. Ogden, 22 U.S. 1, 211 (1924)).

In this case, the plaintiffs do not dispute Congress's power to regulate aliens. Instead, they contend that the Tenth Amendment, the Guarantee Clause, and principles of federalism limit the way in which Congress can exercise its power over aliens. See New York v. United States, 505 U.S. 144, 160 (1992). In Printz v. United States,[8] Nos. 95-1478, 95-1503, 1997 WL 351180 (June 27, 1997), the Supreme Court recently explained:

> The Supremacy Clause ... makes "Law of the Land" only "Laws of the United States which shall be made in Pursuance [of the Constitution]"; so the Supremacy Clause merely brings us back to the question discussed earlier, whether laws conscripting state officers violate state sovereignty and are thus not in accord with the Constitution.

---

[8] Both parties discuss at length in their original motion papers the Court of Appeals' decision in Frank v. United States, 78 F.3d 815 (2d Cir. 1996). Frank, however, has been vacated and remanded by the Supreme Court for further consideration in light of Printz. See Frank v. United States, No. 95-2006, 1996 WL 378614 (June 27, 1997).

Id. at *13. The issue in this case is not whether Congress has broad power to legislate concerning aliens, because it plainly does. The issue is rather whether, in exercising that power by enacting Sections 434 and 642, Congress has violated those provisions of the Constitution that limit the means Congress can use to affect the actions of state and local government officials. See id. at *13-*18; New York, 505 U.S. at 159-69.

III.

The plaintiffs' first cause of action alleges that by prohibiting the City from issuing executive orders, enacting legislation, or otherwise making policy regarding the reporting of undocumented aliens by City officials, the United States has commandeered the City's legislative and executive policymaking apparatus, diminishing political accountability and violating principles of federalism and the Tenth Amendment. (Compl. ¶ 41.) The plaintiffs argue

that Sections 434 and 642 are unconstitutional because they compel the City to bear the political responsibility for ad hoc decisions of City officials on whether to report on immigration status. They contend that the federal government may not avoid responsibility for decision-making or policy concerning aliens by directing the states to allow their officials to assist the federal authorities in dealing with aliens.

It is now settled that the Tenth Amendment and the principles of federalism inherent in the structure of the Constitution limit the ways in which Congress can require action by the states in pursuit of federal policies. In New York v. United States, the Supreme Court invalidated certain provisions of the Low-Level Radioactive Waste Policy Act Amendments of 1985 because it found that they required the states to enact or enforce a federal regulatory program. The Supreme Court instructed: "Congress may

not simply 'commandee[r] the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program.'" New York, 505 U.S. at 161 (quoting Hodel v. Virginia Surface Mining & Reclamation Assn., Inc., 452 U.S. 264, 288 (1981)). In Printz, the Supreme Court invalidated certain provisions of the Brady Handgun Violence Prevention Act (the "Brady Act") that enlisted state and local law enforcement officers to conduct background checks on prospective handgun purchasers and to perform certain other related tasks. See Printz, 1997 WL 351180, at *18. The Court added to New York's prohibition on commandeering state legislatures, a prohibition on commandeering state officials. The Supreme Court explained:

> We held in New York that Congress cannot compel the States to enact or enforce a federal regulatory program. Today we hold that Congress cannot circumvent that prohibition by conscripting the State's officers directly. The Federal Government may neither issue directives requiring the States to

> address particular problems, nor command the States' officers, or those of their political subdivisions, to administer or enforce a federal regulatory program. It matters not whether policymaking is involved, and no case-by-case weighing of the burdens or benefits is necessary; such commands are fundamentally incompatible with our constitutional system of dual sovereignty.

Printz, 1997 WL 351180, at *18.

However, Congress may encourage a state to regulate in a particular way or to provide incentives to the states as a method of influencing a state's policy choices, or may pass appropriate legislation in areas of federal concern that preempts contrary state laws. See New York, 505 U.S. at 166 ("Our cases have identified a variety of methods, short of outright coercion, by which Congress may urge a State to adopt a legislative program consistent with federal interests."); Federal Energy Regulatory Comm'n v. Mississippi, 456 U.S. 742, 762 (1982) ("FERC") ("[T]here are instances where the Court has

upheld federal statutory structures that in effect directed state decision makers to take or to refrain from taking certain actions."). In other words, "valid federal enactments may have an effect on state policy -- and may, indeed, be designed to induce state action in areas that otherwise would be beyond Congress' regulatory authority." FERC, 456 U.S. at 766.

The plaintiffs first argue that Sections 434 and 642 violate the Tenth Amendment and principles of federalism because they require state and local governments to adopt a policy permitting entities and officials to report immigration status to the INS, thereby directly interfering with the sovereign process of policymaking. But the Supreme Court in Printz found that an attempt to analyze congressional statutes on the basis of whether they require "policymaking" by the states is not a workable standard for determining whether the statutes violate the Tenth

Amendment and principles of federalism inherent in the Constitution. In Printz, the Supreme Court found little merit in the attempt to distinguish between "making" law and merely "enforcing" it, between "policymaking" and mere "implementation." See Printz, 1997 WL 351180, at *14.

The Supreme Court made it clear in New York that Congress has the power to regulate directly in an area of federal interest even if that regulation preempts contrary state legislation and thereby changes state policies. See New York, 505 U.S. at 166-67, 178. However, what Congress may not do, no matter how important the federal interest, is to require the states to regulate. See id. at 178.

Congressional legislation is not unconstitutional merely because it displaces state policy choices in an area in which Congress has the power to regulate. See Hodel, 452 U.S. at 290. In South Carolina v. Baker, 485 U.S.

505 (1988), the Supreme Court rejected the argument that a federal law had "commandeered the state legislative and administrative process" because many state legislatures had had to amend a substantial number of statutes and because state officials had had to devote substantial effort to comply with the federal law:

> Such "commandeering" is, however, an inevitable consequence of regulating a state activity. Any federal regulation demands compliance. That a State wishing to engage in certain activity must take administrative and sometimes legislative action to comply with federal standards regulating that activity is a commonplace that presents no constitutional defect.

Id. at 514-15.

In this case, Sections 434 and 642 do not require the City to legislate, regulate, enforce, or otherwise implement federal immigration policy. Instead, they direct only that City officials and agencies be allowed, if they so choose, to share information with federal authorities. The

statutes do not even require any City official to provide any information to federal authorities. They only prevent the City from interfering with a voluntary exchange of information. Although the statutes can be characterized as interfering with a City policy that prevents its officials from cooperating with federal immigration authorities except in accordance with certain procedures, that effect on local policy is not the type of intrusion that is sufficient to violate the Tenth Amendment or principles of federalism.

The plaintiffs also argue that Sections 434 and 642 are analogous to the Brady Act provisions invalidated by the Supreme Court in Printz. They argue that just as it was unconstitutional to require state officials to perform background checks in Printz, it is unconstitutional to preclude the states and localities from preventing their officials from providing information on aliens to federal

authorities. The Court's decision in Printz was based upon the Brady Act's intrusion on state sovereignty:

> It is an essential attribute of the States' retained sovereignty that they remain independent and autonomous within their proper sphere of authority. It is no more compatible with this independence and autonomy that their officers be "dragooned" into administering federal law, than it would be compatible with the independence and autonomy of the United States that its officers be impressed into service for the execution of state law.

Id. at *15 (citations omitted).

However, the Supreme Court in Printz explicitly did not decide whether federal statutes that required the states to provide information to federal authorities were unconstitutional infringements on state sovereignty. As Justice O'Connor emphasized in her concurring opinion:

> the Court appropriately refrain[ed] from deciding whether other purely ministerial reporting requirements imposed by Congress on state and local authorities pursuant to its Commerce Clause powers are similarly invalid. See, e.g., 42 U.S.C. § 5779(a) (requiring state and local law enforcement agencies to report cases of missing children to the

> Department of Justice). The provisions invalidated here, however, which directly compel state officials to administer a federal regulatory program, utterly fail to adhere to the design and structure of our constitutional scheme.

Id. at *18 (O'Connor, J., concurring), see also id. at *10 ("The Government points to a number of federal statutes enacted within the past few decades that require the participation of state or local officials in implementing federal regulatory schemes.... [O]thers, which require only the provision of information to the Federal Government, do not involve the precise issue before us here .... For deciding the issue before us here, they are of little relevance.")

In this case, Sections 434 and 642 are even less intrusive on state sovereignty than those mandatory reporting statutes whose validity the Supreme Court explicitly refrained from deciding. Sections 434 and 642 do not require any reporting by any state and local

officials. They merely prevent state and local authorities from interfering with the voluntary provision of information. They do not contravene the teaching of Printz that Congress cannot conscript state officers to carry out a federal regulatory program.

The plaintiffs also argue that political accountability will be compromised because the City will be forced to bear the brunt of public disapproval for its agents' decisions to provide information on aliens to federal authorities and for its failure to enact a different policy. They also argue that the federal government will escape accountability for the consequences of this reporting. Political accountability is one of the principles that led the Supreme Court to conclude that Congress lacked the power to compel the states to regulate. See New York, 505 U.S. at 168. "Accountability is ... diminished when, due to federal coercion, elected state officials cannot regulate in

accordance with the views of the local electorate in matters not preempted by federal regulation." Id. For example,

> [b]y forcing state governments to absorb the financial burden of implementing a federal regulatory program, Members of Congress can take credit for "solving" problems without having to ask their constituents to pay for the solutions with higher federal taxes. And even when the States are not forced to absorb the costs of implementing a federal program, they are still put in the position of taking the blame for its burdensomeness and for its defects.

Printz, 1997 WL 351180, at *15.

But although political accountability is a basis for concluding that Congress lacks the power to compel the states to regulate or to conscript state and local officials in carrying out a federal program, political accountability standing alone is not a basis for invalidating a Congressional statute that does not implement a federal program in an impermissible way. Otherwise, Congressional statutes that appropriately preempted state law could be challenged on "political accountability"

grounds because state officials could be blamed for changing or not implementing their laws.

In any event, the evils of the lack of political accountability identified in New York and Printz are not present in Sections 434 and 642. These Sections do not require the City to enact a legislative program for which it could be blamed, nor are its officials required to act as agents administering a federal program. Moreover, there is no basis in the pleadings in this case to conclude that local officials will be blamed for the individual, voluntary decisions of City employees who provide information to federal authorities. To the extent that there is any public criticism of the failure of the City to prevent its employees from providing information to federal authorities -- which is itself only a speculative concern -- the plaintiffs can claim legitimately that they are prevented by Sections 434 and 642 from interfering with City officials who wish to

share data with federal authorities even though the plaintiffs would prefer a policy of confidentiality.

In their original motion papers, the plaintiffs also argued that Sections 434 and 642 were unconstitutional because they imposed an onerous burden on the City. In Printz, the Supreme Court explained that an evaluation of the extent of the burden placed upon state officers

> might be relevant if we were evaluating whether the incidental application to the State of a federal law of general applicability excessively interfered with the functioning of state governments. But where, as here, it is the whole object of the law to direct the functioning of the state executive, and hence to compromise the structural framework of dual sovereignty, such a "balancing" analysis is inappropriate. It is the very principle of separate state sovereignty that such a law offends, and no comparative assessment of the various interests can overcome that fundamental defect.

Printz, 1997 WL 351180, at *16 (citations and footnote omitted). The plaintiffs now contend that any inquiry as to whether the City or its officials are burdened by being enlisted in administering federal immigration law is

foreclosed by Printz because Sections 434 and 642 are not laws of general applicability. In any event, even if a balancing analysis were appropriate in this case, the plaintiffs have not alleged a current burden on City officials in their complaint. And indeed any complaint of burden upon City officials would be wholly speculative. There is nothing in the statutes that requires any reporting by any City officials, and there is no basis even to speculate that City officials will spend so much time providing information to federal authorities that it will interfere with their official City duties. There is, in short, no valid argument based on a burden on City officials that is sufficient to invalidate Sections 434 and 642.

Accordingly, because Sections 434 and 642 do not compel the City to legislate or regulate and do not commandeer City officials in the enforcement of a federal program, Sections 434 and 642 do not violate the Tenth

Amendment or principles of federalism. The plaintiffs' first cause of action is therefore dismissed.

IV.

The plaintiffs' second cause of action alleges that by interfering with core functions of City government, by means of a statute directed only at states and localities and not at private individuals, the United States has violated principles of federalism and the Tenth Amendment. The plaintiffs argue that Sections 434 and 642 seriously interfere with the City's ability to define the duties of its own workforce, particularly personnel charged with the preservation and protection of public health and safety. The plaintiffs contend that under a substantive analysis of the Tenth Amendment, Sections 434 and 642 strike at the heart of traditional "incidents of state sovereignty," and should be found invalid.

In National League of Cities v. Usery, 426 U.S. 833 (1976), the Supreme Court held that the Commerce Clause does not empower Congress to enforce the minimum wage and overtime provisions of the Fair Labor Standards Act against the states "in areas of traditional governmental functions." Id. at 852. The Court provided some examples of "traditional governmental functions," but did not offer a general explanation of how a "traditional" function should be distinguished from a "nontraditional" one. In Garcia v. San Antonio Metro Transit Auth., 469 U.S. 528 (1985), which overruled National League of Cities, the Court invalidated the use of a substantive analysis to determine whether particular incidents of state sovereignty were immune from federal government regulation. See id. at 546-47 ("We therefore now reject, as unsound in principle and unworkable in practice, a rule of state immunity from federal regulation that turns on a

judicial appraisal of whether a particular governmental function is 'integral' or 'traditional.'"). The Court explained that the difficulty in defining the scope of the governmental functions had made the standard unworkable. See Garcia, 469 U.S. at 538-41, 548. The Court concluded that "[s]tate sovereign interests ... are more properly protected by procedural safeguards inherent in the limitations on federal power." Id. at 551; see also id. at 556 ("The political process ensures that laws that unduly burden the States will not be promulgated.").

The plaintiffs argue, however, that the substantive analysis under the Tenth Amendment survives Garcia when legislation is directed solely at states or local governments. But the Court in Garcia was clear that the "traditional governmental function" test does not survive in any form:

> The problem is that neither the governmental/proprietary distinction nor any other that purports to separate out important governmental functions can be faithful to the role of

> federalism in a democratic society. The essence of our federal system is that within the realm of authority left open to them under the Constitution, the States must be equally free to engage in any activity that their citizens choose for the common weal, no matter how unorthodox or unnecessary anyone else -- including the judiciary -- deems state involvement to be. Any rule of state immunity that looks to the "traditional," "integral," or "necessary" nature of governmental functions inevitably invites an unelected federal judiciary to make decisions about which state policies it favors and which one it dislikes.

Garcia, 469 U.S. at 545-46. Neither Printz nor New York revived a substantive analysis under the Tenth Amendment. Both relied upon the structural defects in the Congressional statutes at issue that impinged on state sovereignty without an analysis of whether the state functions that were affected were core functions of the states. The defects identified in New York and Printz do not exist in Sections 434 and 642. In view of the Supreme Court's analysis in those cases, and the explicit instructions in Garcia, it would be

inappropriate to resurrect a substantive Tenth Amendment analysis.

Accordingly, the plaintiffs' second cause of action is dismissed.

V.

The plaintiffs' third cause of action alleges that by interfering with the ability of states and local governments and their duly-elected officials to represent the electorate by engaging in the sovereign process of passing legislation or otherwise enacting a policy that prohibits or restricts their officials from sending information to the INS, Sections 434 and 642 violate the Guarantee Clause. The Guarantee Clause provides that "[t]he United States shall guarantee to every State in this Union a Republican Form of Government...." U.S. Const. art. IV, § 4. However, the Supreme Court has traditionally found that claims brought under the Guarantee Clause present nonjusticiable political

questions. See City of Rome v. United States, 446 U.S. 156, 182 n.17 (1980); Baker v. Carr, 369 U.S. 186, 218-29 (1962); Pacific States Tel. & Tel. Co. v. Oregon, 233 U.S. 118, 140-51 (1912); see also Padavan v. United States, 32 F.3d 23, 28 (2d Cir. 1996). Although it is possible that "perhaps not all claims under the Guarantee Clause present nonjusticiable political questions," New York, 505 U.S. at 185, there is no basis in this case for the conclusion that the plaintiffs have presented a justiciable claim. "[N]othing in their complaint indicates in any way that federal immigration policies are depriving New York [City] of a republican form of government." Padavan, 82 F.3d at 28. Moreover, any protection under the Guarantee Clause could hardly be more extensive than the protection afforded the states under the Tenth Amendment and principles of federalism, which are not violated by Sections 434 and 642.

Accordingly, the plaintiffs' third cause of action is dismissed

CONCLUSION

For the reasons explained above, the defendants' motion for judgment on the pleadings is granted, and the plaintiffs' cross-motion for judgment on the pleadings is denied. The Clerk is directed to enter Judgment dismissing the action and closing the case.

SO ORDERED.

Dated: New York, New York
July 18, 1997

John G. Koeltl
United States District Judge

JUDGMENT, DATED JULY 18, 1997
(pp. 89-91)

REPRODUCED FOLLOWING

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------x

THE CITY OF NEW YORK, and RUDOLPH GIULIANI, as Mayor of the City of New York,

Plaintiffs,

- against -

THE UNITED STATES OF AMERICA, and JANET RENO, as Attorney General of the United States,

Defendants.

JUDGMENT

96 **CIVIL** 7758 (JGK)

----------x

Both parties having moved for judgment on the pleadings pursuant to Federal Rule of Civil Procedure 12(c), and the said motions having come before the Honorable John G. Koeltl, United States District Judge, and the Court thereafter, on July 18, 1997, having rendered its Opinion (78953) and Order granting defendants' motion

for judgment on the pleadings and denying plaintiffs' cross-motion for judgment on the pleadings, it is,

ORDERED, ADJUDGED AND DECREED: That for the reasons set forth in the Court's Opinion (78953) and Order of July 18, 1997, defendants' motion for judgment on the pleadings is granted; plaintiffs' cross-motion is denied; accordingly, the above-entitled action is closed.

Dated: New York, New York
July 18, 1997

JAMES M. PARKISON

_____
Clerk of Court

BY: _____
Deputy Clerk

NOTICE OF APPEAL, DATED JULY 22,1997
(pp. 92-94)

REPRODUCED FOLLOWING

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------x

THE CITY OF NEW YORK, and RUDOLPH GIULIANI, as Mayor of the City of New York,

Plaintiffs,

- against -

THE UNITED STATES OF AMERICA, and JANET RENO, as Attorney General of the United States,

Defendants.

NOTICE OF APPEAL

96 Civ. 7758 (JGK)

----------x

PLEASE TAKE NOTICE that plaintiffs hereby appeal to the United States Court of Appeals for the Second Circuit from the opinion and order of the Honorable John G. Koeltl, herein dated July 18, 1997, and entered in the docket on or about the same date, which denied plaintiffs' cross-motion for judgment and granted defendants' motion for judgment and this appeal is taken from each and every

part of said opinion and order as well as from the whole thereof.

Dated: New York, New York
July 22, 1997

PAUL A. CROTTY
Corporation Counsel
Attorney for Plaintiffs
100 Church Street
New York, New York
(212) 788-1010

By: _____
LEONARD KOERNER
Chief Assistant Corporation Counsel

TO: MARTIN J. SIEGEL
Assistant United States Attorney
Attorney for Defendants
100 Church Street, 19th Floor
New York, New York 10007
(212) 385-6256

CLERK
Southern District of New York

APPLICABLE LEGISLATION

REPRODUCED FOLLOWING

Executive Order No. 124

Executive Order No. 124 became the policy of the City of New York through the rule-making process set forth in section 1043 of the New York City Charter ("the Charter"). On June 29, 1989, Mayor Edward I. Koch's notice to the public of the opportunity to comment on the proposed executive order, either in writing or at a public hearing to be held on August 1, 1989, together with the full text of the proposed order, was published in the City Record, the "Official Journal of the City of New York". See Charter § 1043(b)(1) & (d). The order, which was signed by Mayor Koch on August 7, 1989, became effective thirty days after its publication in the City Record on August 14, 1989 (21). See City Record, dated August 14, 1989.

Both of Mayor Koch's successors, David N. Dinkins and the City's current Mayor, Rudolph W.

Giuliani, reissued Executive Order No. 124 which, in relevant part, provides as follows (12):

> **Section 2. Confidentiality of Information Respecting Aliens.**
>
> a. No City officer or employee shall transmit information respecting any alien to federal immigration authorities unless
>
> (1) such officer's or employee's agency is required by law to disclose information respecting such alien, or
>
> (2) such agency has been authorized, in writing signed by such alien, to verify such alien's immigration status, or
>
> (3) such alien is suspected by such agency of engaging in criminal activity, including an attempt to obtain public assistance benefits through the use of fraudulent documents.
>
> b. Each agency shall designate one or more officers or employees who shall be responsible for receiving reports from such agency's line workers on aliens suspected of criminal activity and for determining, on a case by case basis, what action, if any, to take on such reports. No such determination shall be made by any line worker, nor shall any line worker transmit

information respecting any alien directly to federal immigration authorities.

c. Enforcement agencies, including the Police Department and the Department of Correction, shall continue to cooperate with federal authorities in investigating and apprehending aliens suspected of criminal activity. However, such agencies shall not transmit to federal authorities information respecting any alien who is the victim of a crime.

Section 3. Availability of City Services to Aliens.

Any service provided by a City agency shall be made available to all aliens who are otherwise eligible for such service unless such agency is required by law to deny eligibility for such service to aliens. Every City agency shall encourage aliens to make use of those services provided by such agency for which aliens are not denied eligibility by law.

Section 434 of the Welfare Reform Acts

Section 434 of the Welfare Reform Act, entitled "Communication between State and Local Government

Agencies and the Immigration and Naturalization Service," provides:

> Notwithstanding any other provision of Federal, State or local law, no State or local government entity may be prohibited, or in any way restricted, from sending to or receiving from the Immigration and Naturalization Service information regarding the immigration status, lawful or unlawful, of an alien in the United States.

Section 642 of the Immigration Reform Act

Section 642 of the Immigration Reform Act, entitled "Communication Between Government Agencies and the Immigration and Naturalization Service," provides in relevant part:

> (a) IN GENERAL. -- Notwithstanding any other provision of Federal, State, or local law, a Federal, State, or local government entity or official may not prohibit, or in any way restrict, any government entity or official from sending to, or receiving from, the Immigration and Naturalization Service information regarding the citizenship or immigration status, lawful or unlawful, of any individual.

(b) ADDITIONAL AUTHORITY OF GOVERNMENT ENTITIES. --

Notwithstanding any other provision of Federal, State, or local law, no person or agency may prohibit, or in any way restrict, a Federal, State, or local government entity from doing any of the following with respect to information regarding the immigration status, lawful or unlawful, of any individual:

(1) Sending such information to, or requesting or receiving such information from, the Immigration and Naturalization Service.

(2) Maintaining such information.

(3) Exchanging such information with any other Federal, State, or local government entity.

(c) OBLIGATION TO RESPOND TO INQUIRIES. -- The Immigration and Naturalization Service shall respond to an inquiry by a Federal, State, or local government agency, seeking to verify or ascertain the citizenship or immigration status of any individual within the jurisdiction of the agency for any purpose authorized by law, by providing the requested verification or status information.

Tenth Amendment

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people

LEGISLATIVE HISTORY OF EXECUTIVE ORDER 124
Mayoral Memorandum, Dated October 15, 1985

REPRODUCED FOLLOWING

MEMORANDUM

MAYORAL MEMORANDUM

TO: To All Agency Heads

FROM: Edward T. Koch

DATE: October 15, 1985

SUBJECT: City Policy on Undocumented Aliens

New York City is home, we estimate, to somewhere between 400,000 and 750,000 undocumented aliens. For the residents. The greatest problem they pose to the city is their tendency to under use services to which they are entitled and on which their well-being and the City's well-being depend.

For example, victims of crime, consumer fraud or workplace safety violations may decide not to report their victimization for fear that their presence in the City will come to the attention of immigration authorities. Persons who need medical care may decide not to seek it, some families may keep their children out of school, and adults may fail to avail themselves of ESL classes for the very same reasons. It is to the disadvantage of all who live

in the City if some of its residents are uneducated, inadequately protected from crime, or untreated for illness. This is true regardless of one's views on the propriety of unauthorized immigration. Undocumented aliens should not be discourage from making use of those City services to which they should be encourage to do so. Undocumented aliens will not avail themselves of city services as long as they fear they will be reported to immigration authorities. It is probably impossible to eradicate that fear, but the city can take steps to reduce it.

Federal law specifies that immigration control is the sole province of federal authorities. The city has no obligation to report undocumented aliens to immigration authorities except when such aliens are engaged in criminal activities, including attempts to obtain public benefits through the use of fraudulent documents.

It is the current policy of most city agencies not to report aliens to immigration authorities unless the alien has given signed permission for a status check or the alien appears to be engaged in some kind of criminal behavior. I want to reaffirm this as city-wide policy.

Furthermore, I want to make it clear that determinations of criminal activity or the use of false documents should not be made by line workers in city agencies. Each agency head should identify a person or office that is charged with receiving reports from line workers on aliens who are suspected of criminal misconduct. This designated person or office should make the determinations on how each case is to be handled. by November 15th, I would like to receive from you an

indication of the person or office you have designated for this responsibility and a description of the procedures that will be used in determining when and where to report aliens who may be involved in criminal misconduct.

Enforcement agencies, like the Police Department and the Department of Correction, are both permitted and obligated to cooperate with the immigration authorities in apprehending aliens who are committing crimes. This memo is not intended to change their current practice. It is extremely important, however, that enforcement agencies do everything they can to assure crime victims that they will not be reported.

All agencies should be doing what they can to encourage law-abiding aliens to use those city services to which they are entitled under law. Many city services are available to undocumented aliens including health care, mental health care, education, libraries, police and fire protection, consumer protection, civil rights protection, and basic physical services. The rules and regulations governing the social service programs are sometimes quite complex, especially among the income transfer programs. We will release shortly a pamphlet explaining, for the line worker's information, which programs are available to each class of alien and which documents are needed to prove eligibility. Please make use of this material when you receive it.

In addition, we expect to prepare a flier for undocumented aliens that lists the city services to which they are entitled and assures them of the city's commitment

not to report them to immigration authorities as long as they are leading law-abiding lives.

Not all of your city agencies have day-to-day dealings with undocumented aliens, but it is important to be aware of these issues, which become increasingly significant to the city as its population changes. Because of the growing importance of these matters, I created an Office of Immigrant Affairs (OIA) at the Department of City Planning last year. If questions arise in your agency on immigration issues, please feel free to consult with the OIA at 566-2944.

Many of you do have daily contacts with undocumented aliens, and I know you have made successful efforts to protect the rights of your undocumented clients. The purpose of this memo is to articulate for all city agencies the policies and procedures that many of you already have adopted.

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STATEMENT OF BASIS AND PURPOSE OF EXECUTIVE ORDER

REPRODUCED FOLLOWING

Statement of Basis and Purpose of Executive Order. Section 3 of the New York City Charter provides that the Mayor "shall be the chief executive officer of the city." The New York State Court of Appeals has stated that the Mayor's authority in that capacity "does, of course, include the power to enforce and implement legislative enactments." Under 21 v. City of New York, 65 N.Y.2d 344, 356 (1985).

Many services provided by New York City, including education and police protection, are available to all City residents regardless of their citizenship or immigration status. However, many aliens who reside in the City fail to make use of such services, largely from fear that any contact with a government agency will bring them to the attention of federal immigration authorities. It is to the disadvantage of all City residents if some who live in the City are uneducated, inadequately protected from crime, or untreated for illness. Regardless of their immigration status, aliens should not be discouraged from utilizing those City services to which they are entitled. On the contrary, the public welfare requires that they be encouraged to do so. Yet many aliens will continue to avoid City agencies as long as they fear that they will be reported to federal immigration authorities.

Federal law places full responsibility for immigration control on the federal government. With limited exceptions, the City therefore has no legal obligation to report any alien to federal authorities. The executive order, in recognition of this lack of obligation and the importance of providing the services covered herein, requires City agencies to preserve the confidentiality of all

information respecting law-abiding aliens to the extent permitted by law. City agencies are also prohibited hereby from arbitrarily excluding aliens from eligibility for services which are available to all. In this way, it is hoped, aliens will be encouraged to make use of City services to which they are entitled by law.

No. 99-328

In the Supreme Court of the United States

CITY OF NEW YORK, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

SETH P. WAXMAN
Solicitor General
Counsel of Record

DAVID W. OGDEN
Acting Assistant Attorney General

MARK B. STERN
ALISA B. KLEIN
Attorneys

Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTION PRESENTED

Whether Section 434 of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996, 8 U.S.C. 1644 (Supp. III 1997), and Section 642 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, 8 U.S.C. 1373 (Supp. III 1997), which preempt state and local laws inhibiting state and local governmental entities and employees from providing information about the immigration status of individuals to the Immigration and Naturalization Service, violate the Tenth Amendment.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-19) is reported at 179 F.3d 29. The opinion of the district court (Pet. App. 53-88) is reported at 971 F. Supp. 789.

JURISDICTION

The judgment of the court of appeals was entered on May 27, 1999. The petition for a writ of certiorari was filed on August 23, 1999. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. This case involves a constitutional challenge brought by the City of New York and its Mayor to Section 434 of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (PRWORA), 8 U.S.C. 1644 (Supp. III 1997), and Section 642 of the

Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), 8 U.S.C. 1373 (Supp. III 1997). As pertinent here, those provisions preempt a New York City Executive Order that, with limited exceptions, forbids City employees from voluntarily sharing information about aliens with federal immigration authorities. Pet. App. 3-6.

In 1989, the Mayor of New York City issued Executive Order No. 124 (Order). Pet. App. 96-98. The Order provides that "[n]o City officer or employee shall transmit information respecting any alien to federal immigration authorities" unless the disclosure is "required by law," the alien has authorized the disclosure, or the alien is "suspected of * * * engaging in criminal activity." *Id.* at 97.[1] The Order's "Statement of Basis and Purpose" (*id.* at 107-109) explains that many aliens who lived in the City were failing to make use of City services, "largely from fear that any contact with a government agency will bring them to the attention of federal immigration authorities." *Id.* at 108. The statement concluded that this reluctance of aliens to use City services operated "to the disadvantage of all City residents." *Ibid.*

2. In 1996, Congress enacted two provisions that preempt Executive Order No. 124. Section 434 of

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[1] The Order further provides that City agencies shall designate officers or employees to be responsible for receiving reports from line workers who suspect criminal activity by aliens and for determining on a case-by-case basis what action, if any, to take on such reports. The Order bars line workers from transmitting information about any alien directly to federal immigration authorities. In addition, the Order bars City law enforcement agencies from transmitting to federal immigration authorities information about the immigration status of crime victims. See Pet. App. 97-98.

PRWORA provides that, notwithstanding any other provision of federal, state or local law, "no State or local government entity may be prohibited, or in any way restricted, from sending to or receiving from the Immigration and Naturalization Service information regarding the immigration status, lawful or unlawful, of an alien in the United States." 8 U.S.C. 1644 (Supp. III 1997). That provision permits, but "does not require, in and of itself, any government agency or law enforcement official to communicate with the INS." H.R. Conf. Rep. No. 725, 104th Cong., 2d Sess. 383 (1996). Section 642 of IIRIRA similarly provides that, notwithstanding any other provision of federal, state or local law, "a Federal, State, or local government entity or official may not prohibit, or in any way restrict, any government entity or official from sending to, or receiving from, the Immigration and Naturalization Service information regarding the citizenship or immigration status, lawful or unlawful, of any individual." 8 U.S.C. 1373(a) (Supp. III 1997).[2]

3. a. New York City brought this action for declaratory and injunctive relief in federal district court, contending that Sections 1373 and 1644 violate the Tenth Amendment and therefore do not nullify Executive Order No. 124. Pet. App. 21-44.[3] The district court

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[2] Section 642(b) of IIRIRA further provides that, notwithstanding any other provision of federal, state or local law, "no person or agency may prohibit, or in any way restrict, a Federal, State, or local government entity" from sending information about an individual's immigration status, lawful or unlawful, to the INS, from maintaining such information, or from exchanging such information with any other federal, state, or local government entity. See 8 U.S.C. 1373(b) (Supp. III 1997).

[3] The City also alleged that Sections 1373 and 1644 violate the Constitution's Guarantee Clause (Art. IV, § 4). See Pet. App. 42-

granted the federal government's motion for judgment on the pleadings. *Id.* at 54-91. The court first rejected the City's claim that the challenged provisions contravene the Tenth Amendment because they interfere with city policymaking: "Congressional legislation is not unconstitutional merely because it displaces state policy choices in an area in which Congress has the power to regulate." *Id.* at 72 (citing *Hodel* v. *Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 290 (1981)).

The district court then held that the challenged provisions do not run afoul of this Court's decisions in *New York* v. *United States*, 505 U.S. 144 (1992), and *Printz* v. *United States*, 521 U.S. 898 (1997), that Congress may not commandeer the States or their officials into federal service by requiring them to enact or implement a federal regulatory scheme. The court explained that the challenged provisions "do not require the City to legislate, regulate, enforce, or otherwise implement federal immigration policy." Pet. App. 73. To the contrary, "they direct only that City officials and agencies be allowed, if they so choose, to share information with federal authorities." *Ibid.* Indeed, the statutes "do not even require any City official to provide any information to federal authorities." *Id.* at 74. Thus, the challenged provisions are "even less intrusive on state sovereignty than those mandatory reporting statutes whose validity the Supreme Court explicitly refrained from deciding." *Id.* at 76.

The district court likewise rejected the argument that the challenged provisions are invalid because they diminish political accountability. The court explained

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43. The district court and the court of appeals rejected that claim, and the City has not pressed it before this Court.

that, "although political accountability is a basis for concluding that Congress lacks the power to compel the states to regulate or to conscript state and local officials in carrying out a federal program, political accountability standing alone is not a basis for invalidating a Congressional statute that does not implement a federal program in an impermissible way." Pet. App. 78.

Finally, the district court rejected the argument that the challenged provisions are unconstitutional because they interfere with core City functions. See Pet. App. 83-84 (explaining that this Court rejected, "as unsound in principle and unworkable in practice, a rule of state immunity from federal regulation that turns on a judicial appraisal of whether a particular governmental function is 'integral' or 'traditional' ") (quoting *Garcia* v. *San Antonio Metro. Trans. Auth.*, 469 U.S. 528, 546-547 (1985)).

b. The court of appeals affirmed. The court agreed with the district court that, unlike the statutory provisions at issue in *New York* and *Printz*, Sections 1373 and 1644 "do not directly compel states or localities to require or prohibit anything." Pet. App. 13. Instead, "they prohibit state and local governmental entities or officials only from directly restricting the voluntary exchange of immigration information with the INS." *Ibid.* Stressing that the Supremacy Clause "bars states from taking actions that frustrate federal laws and regulatory schemes," *id.* at 14, the court declined "to turn the Tenth Amendment's shield against the federal government's using state and local governments to enact and administer federal programs into a sword allowing states and localities to engage in passive resistance that frustrates federal programs." *Id.* at 13-14.

The court also rejected the argument that the challenged provisions are invalid because they interfere with important city operations. The court suggested that the City's interest in preserving the confidentiality of information was "not insubstantial," Pet. App. 16, but concluded that the City had "chosen to litigate this issue in a way that fails to demonstrate an impermissible intrusion on state and local power to control information obtained in the course of official business or to regulate the duties and responsibilities of state and local governmental employees." *Id.* at 17. The court observed that Executive Order No. 124 is not a general policy that limits the disclosure of confidential information; instead, "it singles out a particular federal policy for non-cooperation while allowing City employees to share freely the information in question with the rest of the world." *Ibid.* The court explained that, although it had invited the City to explain whether the information covered by the Order might be subject to other confidentiality provisions that would prevent its dissemination generally, the City's response provided the court only with a list of policies that might or might not protect information about immigration status. See *id.* at 18.

ARGUMENT

The decision of the court of appeals, upholding the challenged provisions of Sections 1373 and 1644 of Title 8 of the United States Code as valid exercises of Congress's power to ensure that the effectiveness of federal legislation is not impaired by state law, is correct and does not conflict with any decision of this Court or any other court of appeals. Nor, contrary to petitioners' contention (Pet. 20), does this case involve the issues currently before the Court in *Reno* v. *Condon*, No. 98-

1464 (to be argued Nov. 10, 1999). The petition for a writ of certiorari should therefore be denied.

1. Congress has plenary and exclusive power to regulate immigration. Indeed, "[o]ver no conceivable subject is the legislative power of Congress more complete." *Reno* v. *Flores*, 507 U.S. 292, 305 (1993) (internal quotation marks and citation omitted). As the Court has explained:

> The Federal Government has broad constitutional powers in determining what aliens shall be admitted to the United States, the period they may remain, regulation of their conduct before naturalization, and the terms and conditions of their naturalization. Under the Constitution the states are granted no such powers; they can neither add to nor take from the conditions lawfully imposed by Congress upon admission, naturalization and residence of aliens in the United States or the several states.

Takahashi v. *Fish & Game Comm'n*, 334 U.S. 410, 419 (1948) (citation omitted).

In exercising its broad powers to regulate immigration, Congress has determined that the costs of allowing unrestricted immigration would exceed the benefits of such a policy. See, *e.g.*, H.R. Rep. No. 469, 104th Cong., 2d Sess. Pt. 1, at 110 (1996) ("[u]nlimited immigration * * * is a moral and practical impossibility"). Congress has accordingly enacted a comprehensive and detailed regulatory scheme that establishes the number of aliens who may be admitted to the United States, the bases on which aliens may or must be excluded from the United States, the conditions under which aliens may remain in the United States, and the circumstances under which they may be removed.

Congress has also made plain that "immigration law enforcement is as high a priority as other aspects of Federal law enforcement, and that illegal aliens do not have the right to remain in the United States undetected and unapprehended." H.R. Conf. Rep. No. 725, *supra*, at 383. In enacting the provisions at issue here, Congress determined that a state or local governmental policy barring voluntary cooperation with federal law enforcement officials was incompatible with that important priority of effective federal implementation of the immigration laws. Thus, the challenged statutes preempt such provisions that require governmental officials not to provide information to federal immigration officers.

Petitioners' contention that Congress has no power to preempt the 'policy choices embodied in Executive Order No. 124," Pet. 17, is therefore without foundation. Congress has such authority by virtue of its plenary authority to regulate immigration. Plainly, when Congress determines that a provision of local law is inconsistent with the enforcement of federal law, the Constitution places no obstacle to federal preemption. And although such "congressional enactments obviously curtail or prohibit the States' prerogatives to make legislative choices respecting subjects the States may consider important, the Supremacy Clause permits of no other result." *Hodel* v. *Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 290 (1981).

Petitioners argue that "[t]he People of the States did not * * * confer authority upon Congress to subordinate their health, safety and well-being to the regulation of immigrants in accordance with congressionally-imposed rules." Pet. 20-21. That argument turns the Supremacy Clause on its head. It may well be that New York City has determined that,

from its perspective and that of its residents, the costs of enforcing the federal immigration laws exceed the benefits, but Congress is responsible for balancing the costs and benefits of federal immigration policy for the Nation as a whole, and it has reached a different conclusion. It is axiomatic that "the government of the Union, though limited in its powers, is supreme within its sphere of action." *M'Culloch* v. *Maryland*, 17 U.S. (4 Wheat.) 316, 404 (1818).

2. The provisions challenged in this case are therefore an unexceptionable exercise of Congress's authority to preempt state laws that, Congress concludes, impair the effectiveness of federal legislation that falls within the legitimate scope of congressional power. Petitioners contend, nonetheless, that Sections 1373 and 1644 contravene the Tenth Amendment as construed in this Court's decisions in *New York* and *Printz*, but those decisions lend no support to petitioners' claim.

The statute at issue in *New York* required the States either to regulate the way that private entities disposed of low-level radioactive waste, or to take title to that waste and assume liability for the private generators' damages. See *New York*, 505 U.S. at 153-154. Both provisions effectively required the States to adopt a regulatory solution to problems created by private conduct.

As the Court explained in *New York*, imposing an affirmative obligation on the States to take title to the private waste was "no different from a congressionally compelled subsidy from state governments to radioactive waste producers," and requiring the States to assume liability for the generators' damages was "indistinguishable from an Act of Congress directing the States to assume the liabilities of certain state

residents." 505 U.S. at 175. On the other hand, the option of "regulating pursuant to Congress' direction" presented "a simple command to state governments to implement legislation enacted by Congress." *Id.* at 175-176. The Court explained that "[e]ither way, the Act commandeers the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program." *Id.* at 186 (citation and internal quotation marks omitted).

Similarly, the statute at issue in *Printz* required state officials to make reasonable efforts to determine whether proposed handgun sales by private sellers to private buyers would be unlawful. See *Printz*, 521 U.S. at 903. The Court therefore held that the case was governed by its holding "in *New York* that Congress cannot compel the States to enact or enforce a federal regulatory program." *Id.* at 935. The Court made clear that "Congress cannot circumvent that prohibition by conscripting the States' officers directly." *Ibid.* Thus, as in *New York*, the provision in *Printz* was invalidated because it "dragooned" state governments into implementing a federally prescribed regulatory solution to private sector problems that were not of the States' own making. *Id.* at 928.

The provisions challenged here do not violate the anti-commandeering principle articulated in *New York* and *Printz*. As the courts below explained, the provisions at issue in this case "do not directly compel states or localities to require or prohibit anything." Pet. App. 13. They "do not require the City to legislate, regulate, enforce, or otherwise implement federal immigration policy." *Id.* at 73. Indeed, they "do not even require any City official to provide any informa-

tion to federal authorities." *Id.* at 74.[4] Rather, to promote the effective enforcement of federal immigration laws and policies, the challenged provisions simply ensure that state and local government officials (like federal officials and private individuals) will be free to provide information about the immigration-related status of an alien to the INS in the ordinary course of business, without interference from state and local laws.

3. Petitioners argue (Pet. 20) that the decision of the court of appeals in this case conflicts with the court of appeals' decision in *Condon* v. *Reno*, 155 F.3d 453 (4th Cir. 1998), cert. granted, No. 98-1464 (to be argued Nov. 10, 1999). In *Condon*, a divided panel of the Fourth Circuit invalidated the Driver's Privacy Protection Act of 1994 (DPPA), 18 U.S.C. 2721-2725 (1994 & Supp. III 1997), which imposes restrictions on the dissemination of information from records of state motor vehicle departments. In *Condon*, the the Fourth Circuit held the DPPA invalid because, it concluded, "Congress may only subject the States to legislation that is also applicable to private parties." 155 F.3d at 461.

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[4] In *Printz*, this Court distinguished the case before it from that of statutes that "require only the provision of information to the Federal Government" and therefore do not involve "the forced participation of the States' executive in the actual administration of a federal program." 521 U.S. at 918. As the concurrence explained, the Court thus "appropriately refrain[ed] from deciding whether other purely ministerial reporting requirements imposed by Congress on state and local authorities pursuant to its Commerce Clause powers [were] similarly invalid." *Id.* at 936 (O'Connor, J., concurring). The provisions challenged here, which impose no reporting requirements on the States, are "even less intrusive on state sovereignty than those mandatory reporting statutes whose validity the Supreme Court explicitly refrained from deciding." Pet. App. 76.

We have explained in our briefs on the merits in this Court in *Condon* that the categorical rule announced by the Fourth Circuit in that case has no basis in precedent or logic.[5] We also note, however, that the Fourth Circuit did not hold in *Condon* that Congress may not preempt state law that inhibits the operation of federal law as an incident to Congress's otherwise legitimate exercise of its regulatory powers. In *Condon*, the Fourth Circuit sought to distinguish the DPPA from this Court's preemption cases on the ground that (in its view) the DPPA is not part of a federal regulatory scheme that governs private activity. 155 F.3d at 463 n.6. The provisions challenged here, however, *are* parts of such schemes; PRWORA regulates the area of welfare benefits, including the eligibility of aliens for such benefits, and IIRIRA, which comprehensively amended the Immigration and Nationality Act, regulates the circumstances under which aliens may be admitted to and may reside in the United States. And while we have argued in our brief on the merits in *Condon* (at 38-39) that it is difficult to square the Fourth Circuit's decision with this Court's preemption jurisprudence, the precise issue before the Court in *Condon* is not the validity of a preemption provision, as such. Accordingly, the decision below does not present a conflict with the Fourth Circuit's decision in *Condon*, and there is no need to hold this case for the Court's decision in *Condon*.

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[5] See Gov't Br. at 34-38 and Gov't Reply Br. at 13-20, *Condon*, *supra*. We are providing petitioners with a copy of those briefs.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

SETH P. WAXMAN
Solicitor General

DAVID W. OGDEN
Acting Assistant Attorney General

MARK B. STERN
ALISA B. KLEIN
Attorneys

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